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## The Treaty Power\*

KENNETH C. RANDALL\*\*

### I. INTRODUCTION

The Constitution says precious little about treaties. In article II, the "treaty clause" simply gives the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."<sup>1</sup> In addition, article III extends the "judicial Power . . . to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made."<sup>2</sup> These references to treaties are sparse probably because the framers' primary objective was to ensure that the federal government, not the states, possessed authority over international agreements. That federalism goal—helping to strengthen and improve the nation's foreign relations in a centralized government, thus avoiding the separate states' embarrassing international forays under the weak Articles of Confederation<sup>3</sup>—could easily be accomplished by two final constitutional references to treaties: "No State shall enter into any Treaty"<sup>4</sup>; and "all Treaties made, or which shall be made, . . . shall be the Supreme Law of the Land."<sup>5</sup> Nevertheless, the Constitution inadequately illuminates how the treaty power is distributed among the three federal branches of government. As a former Assistant Secretary of State recently remarked to the Senate Committee on Foreign Relations: "I do not hold that the treaty clause of the Constitution was the finest hour of the Philadelphia Convention. [That clause] may not be the most unworkable provision of our funda-

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\*\* Vice Dean and Professor of Law, University of Alabama. J.S.D. 1988, Columbia University School of Law; LL.M. 1985 (Fellowship), Columbia University School of Law; LL.M. 1982 (Fellowship), Yale Law School; J.D. 1981, Hofstra University School of Law; Associate 1982-84, Simpson Thacher & Bartlett, New York City. Author, *FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM* (Duke University Press 1990). This Article has benefited from Susan Lyons Randall's comments; research funding from Dean Nathaniel Hansford and the University of Alabama Law School Foundation; word-processing support from Lori Hall and her staff; secretarial assistance from Jean Warren; and research assistance from Edwin Cleverdon, John Norris, and Charlotte Ruben.

1. U.S. CONST. art. II, § 2, cl. 2.

2. U.S. CONST. art. III, § 2, cl. 1.

3. See generally L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 33, 227-34 (1972); K. RANDALL, *FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM* 13-16, 19-22 (1990).

4. U.S. CONST. art. I, § 10, cl. 1.

5. U.S. CONST. art. VI, cl. 2.

mental document, but its defects are serious. It is more check than balance . . .  
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The past decade witnessed several significant separation of powers disputes over important treaties. Mostly involving the President and the Senate, these controversies have concerned both the interpretation and termination of treaties. The treaty interpretation debate essentially concerns how much latitude the President should be afforded in applying and enforcing international accords. Disarmament agreements have been at the center of this debate. When President Reagan inaugurated the Strategic Defense Initiative ("SDI" or "Star Wars"), many lawmakers claimed that the SDI's development and deployment would be illegitimate under the Senate's original understanding of the 1972 Treaty on Anti-Ballistic Missile Systems ("ABM Treaty")<sup>7</sup> and would improperly be based upon the President's reinterpretation of that Treaty.<sup>8</sup> The reinterpretation dispute continued over the Treaty on the Elimination of Intermediate-range and Shorter-range Missiles ("INF Treaty"),<sup>9</sup> to which the Senate saw fit to attach the "Biden Condition." That Condition obligates the executive branch to interpret the INF Treaty pursuant to the President's and the Senate's shared and original understanding of the Treaty.<sup>10</sup> After the INF Treaty entered into force, however, President Reagan disavowed the Biden Condition as posing an unconstitutional intrusion into executive authority.<sup>11</sup>

The treaty termination debate concerns which branch(es) of the federal government can constitutionally terminate treaties, given the Constitution's silence about how to unmake treaties. This issue, more specifically, considers whether the President may terminate treaties without the Senate's advice and consent. Here, the paradigm for study is Senator Goldwater's challenge to President Carter's unilateral termination of the Mutual Defense Treaty with the Republic of China ("Taiwan"),<sup>12</sup> when the United States shifted recognition to the People's Republic of China ("PRC"). Although that case reached the Supreme Court, the Court did not rule on the merits of whether President Carter's treaty termination was valid without senatorial consent.<sup>13</sup>

With each conflict over treaty interpretation or termination has come congressional hearings, scholarly commentaries, and sometimes litigation concerning the specific dispute at hand. What is usually missing, however, is a more comprehensive vision of the treaty power; an effective and a unified solution to all problems in the treaty process is still needed. This Article will demonstrate

6. *Treaty Termination: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 284 (1979) (statement of William D. Rogers, Former Assistant Secretary of State for Inter-American Affairs) [hereinafter *Treaty Termination Hearings*].

7. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-USSR, 23 U.S.T. 3435, T.I.A.S. No. 7503 [hereinafter ABM Treaty].

8. See *infra* notes 53-77 and accompanying text.

9. Treaty on the Elimination of Intermediate-range and Shorter-range Missiles, Dec. 8, 1987, United States-U.S.S.R., 23 WEEKLY COMP. PRES. DOC. 1459 [hereinafter INF Treaty].

10. See *infra* notes 78-100 and accompanying text.

11. See *infra* notes 96-100 and accompanying text.

12. Mutual Defense Treaty Between the United States of America and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433, T.I.A.S. No. 3178 [hereinafter Mutual Defense Treaty].

13. *Goldwater v. Carter*, 444 U.S. 996 (1979). See *infra* notes 104-36 and accompanying text.

that the reinterpretation and termination controversies are actually interrelated. This Article, moreover, contends that those current controversies are connected to the much older debate about whether the President can constitutionally conclude certain international agreements without following the treaty clause's procedures. Still not resolved, that debate concerns the so called "executive agreements," which Presidents from Washington to Bush have established with foreign leaders. Although most executive agreements receive some congressional approval, none are subjected to the rigorous demands of receiving two-thirds of the Senate's consent; and certain executive agreements do not receive any congressional acquiescence.<sup>14</sup> The executive-agreement debate essentially involves questions about *making* international compacts, and it is logical to link those questions with questions about interpreting and terminating treaties; these questions together concern the nation's governance of international agreements. Separation of powers concerns—delimiting the treaty power within the tripartite federal government—are equally and interdependently implicated by questions about making, applying, and unmaking agreements. The federal government can clarify and resolve the reinterpretation and termination controversies only if it first untangles the executive-agreement controversy. If the executive branch is guilty of unconstitutionally reinterpreting and terminating treaties, its chauvinism may derive from the liberties it has historically taken by circumventing the treaty clause in making executive agreements.

This Article's thesis is straightforward: Where article II of the Constitution empowers the executive to govern exclusively over a particular topic, the President may unilaterally make, reinterpret, and terminate executive agreements without any senatorial consent. Conversely, where article I gives the Congress authority over a particular topic, or where articles I and II distribute authority over that topic to both the Congress and the executive, the President must establish either a treaty with the Senate's consent or at least an executive agreement with congressional authorization. In such cases, the President may neither unilaterally reinterpret nor terminate that treaty or executive agreement. Although others have concentrated upon the behavioral or functional nature of making, applying, and terminating treaties,<sup>15</sup> this Article instead focuses upon the subject matter of specific agreements. It recommends a unifying "topical approach" to resolve all disputed aspects of the treaty process. The starting point for analyzing the reinterpretation and termination problems is whether the President has the authority to create an executive agreement on a particular topic without congressional authorization. Under a topical analysis, only if such exclusive executive authority exists, can the President also unilaterally reinterpret and terminate those agreements.

Parts II, III, and IV of this Article, respectively, will examine executive agreements, the interpretation of international agreements, and the termination of international agreements. Linking those three topics together, part V will elaborate upon and apply this Article's thesis.

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14. See *infra* notes 18-50 and accompanying text.

15. See *infra* notes 173-74 and accompanying text.

## II. MAKING COMPACTS: THE EXECUTIVE-AGREEMENT DEBATE

As with the current issues of interpreting and terminating treaties, the dialectics of executive agreements involve constitutional law, not international law. Treaties and executive agreements equally bind the United States and other nations in relation to each other under international law.<sup>16</sup> Within the United States and other domestic systems, each government has discretion over how to establish and manage international agreements.<sup>17</sup> So the continuing controversy over executive agreements is a matter of constitutional norms and the relations between the political branches, not international norms and foreign relations. This dichotomy of constitutional law and international law — the former regulating the United States legal order, the latter regulating the world legal order — is significant. For example, if the President creates an executive agreement where the Constitution "requires" a treaty, the agreement is internationally valid, even if constitutionally invalid. The reinterpretation and termination of treaties and executive agreements may also cause contradictions between constitutional commandments and international norms. Since the executive's creation, application, and termination of international agreements will always have foreign relations implications, it is important that the President have a firm constitutional basis for acting.

Assessing such Presidential authority initially depends upon whether executive agreements are constitutional. That analysis is particularly important today, when more than ninety percent of the United States' international agreements are not treaties, but befit one of three categories of executive agreements:<sup>18</sup> a "treaty authorized executive agreement," which is an agreement that the President establishes with another nation pursuant to a treaty to

16. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 comment a (1986) (whatever the designation of international agreements, "all agreements have the same legal status . . .") [hereinafter RESTATEMENT]. The Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. II(1)(a), 1155 U.N.T.S. 331, 333 (entered into force Jan. 27, 1980), U.N. Doc. A/CONF.39/27, reprinted in 8 I.L.M. 679, 681 (1969) [hereinafter Vienna Convention], equally applies to treaties and executive agreements, since its definition of "treaty" includes any "international agreement concluded between States in written form and governed by international law . . ." The Vienna Convention, which contains international norms regulating treaty practices, including the obligation of nations to comply with their international agreements, is authoritative in the United States. See RESTATEMENT, *supra*, at pt. III introductory note.

17. A nation's authority to make and regulate international agreements is inherently part of its sovereignty. See RESTATEMENT, *supra* note 16, at § 302 comment a. Each nation may internally govern those agreements, just as each nation has discretion about how to implement most international privileges and obligations: "In general, as long as a state carries out its obligations, how it does so is not the concern of international law." L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 140 (2d ed. 1987). Although the international and constitutional systems are distinct—and although the current treaty controversies and this Article concern the latter system—the government's handling of international agreements may certainly have international repercussions.

18. See CONGRESSIONAL RESEARCH SERVICE, 95th Cong., 1st Sess., INTERNATIONAL AGREEMENTS: AN ANALYSIS OF EXECUTIVE REGULATIONS AND PRACTICES 22-23 (Comm. Print 1977) (R. Majak). For example, between 1946 and 1972, 6.2% of the United States' international agreements were treaties; 5.5% were sole-executive agreements; and 88.3% were congressional-executive agreements. *Id.* at 22. Those statistics do not include treaty authorized executive agreements. The United States was a party to 906 treaties and 6,571 executive agreements (primarily congressional-executive agreements) on June 1, 1983. See TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. REP. NO. 205, 98th Cong., 2d Sess. at 38 (1984). For background on executive agreements, see L. HENKIN, *supra* note 3, at 173-87; RESTATEMENT, *supra* note 16, at § 303 comments and reporters' notes; 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 193-255 (1970); Rovine, *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397 (1977).

which the Senate earlier consented; a "congressional-executive agreement," to which the President procures a majority of both Houses' consent, rather than two-thirds of the Senate's consent, before or after making the agreement with another nation; and, the most constitutionally problematic, a "sole-executive agreement," which the President establishes with another nation without any senatorial or congressional consent.

#### A. *Treaty Authorized Executive Agreements*

For even stalwart "congressional supremacists," treaty authorized executive agreements do not pose constitutional problems.<sup>19</sup> In this context, the President originally received two-thirds of the Senate's consent when the initial compact, the treaty, was created. So, the Senate essentially preapproved the subsequent compact, the executive agreement; or the Senate may be viewed to have delegated to the President the authority to make the executive agreement. The President's adherence to the Constitution's treaty clause when originally making the treaty validates the President's implementation of the executive agreement. Treaty based executive agreements are also legitimate under the President's power to "take Care that the Laws be faithfully executed,"<sup>20</sup> since the term "Laws" in that passage includes United States treaties.<sup>21</sup> The Supreme Court has upheld the validity of a treaty authorized executive agreement.<sup>22</sup> Questions have occasionally arisen about whether a treaty authorized a particular agreement.<sup>23</sup> Those questions, however, do not involve constitutional law, but present issues of treaty interpretation.

#### B. *Congressional-Executive Agreements*

The second genus of executive agreements includes compacts that the President creates pursuant to prior federal legislation; it also includes the more disputed executive agreements that the Congress only later approves through legis-

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19. For example, Professor Raoul Berger's article on executive agreements, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972), which epitomizes the congressional supremacists' criticism of executive agreements for circumventing the treaty clause, does not even mention treaty authorized agreements. See also *infra* notes 25-29 and accompanying text. This Article adopts the terms "congressional supremacists" and "executive supremacists" to refer, respectively, to those observers who take prolegislative-branch or pro-executive-branch positions concerning the treaty power. Professor Berger and other congressional supremacists might also be labeled "exclusivists," since, with the exception of treaty authorized executive agreements, they claim that international agreements must exclusively be treaties, not executive agreements.

20. U.S. CONST. art. II, § 3, cl. 1.

21. This conclusion derives from the supremacy clause's designation of treaties as being part of federal law. See U.S. CONST. art. VI, cl. 2. See generally Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

22. E.g., *Wilson v. Girard*, 354 U.S. 524 (1957) (executive agreement that regulates criminal jurisdiction over United States military in Japan was authorized by prior security treaty with Japan and thus valid). See 14 M. WHITEMAN, *supra* note 18, at 229-33, for additional examples of valid treaty authorized executive agreements.

23. See, e.g., Murphy, *Treaties and International Agreements Other than Treaties: Constitutional Allocation of Power and Responsibility Among the President, the House of Representatives, and the Senate*, 23 U. KAN. L. REV. 221, 227-29 (1974-75) (discussing 1971 debate between Senate and State Department about whether an executive agreement with Portugal on stationing United States forces was authorized by NATO Treaty); Note, *Executive Agreements: Beyond Constitutional Limits?*, 11 HOFSTRA L. REV. 805, 812-15 (1983) (discussing same debate).

lation or simply by joint resolution.<sup>24</sup> Congressional-executive agreements differ from treaties and treaty authorized executive agreements in that they receive the assent of the majority (not the two-thirds supermajority) of all members of Congress (not just Senators). Congressional-executive agreements are also different in terms of timing, in cases where the Congress approves them after their creation. Unlike treaty authorized executive agreements, congressional-executive agreements have generated much debate among scholars and government officials.

One extreme interpretivist view holds that all compacts must be made according to the treaty clause, and thus all congressional-executive agreements are constitutionally invalid.<sup>25</sup> The opposite noninterpretivist view holds that congressional-executive agreements and treaties are entirely interchangeable, and thus all such compacts are constitutional.<sup>26</sup> At the heart of such polar positions is the fact that the Constitution's treaty clause mentions only treaties and not any other international compacts; nowhere else in articles I or II are the Congress or the President expressly granted authority to make compacts other than treaties.<sup>27</sup> That fact, according to the interpretivists, means that the constitutional text precludes the nation from entering binational and multinational agreements without two-thirds of the voting Senators' consent. To read the Constitution otherwise aggrandizes executive power, by permitting the President to evade the treaty clause's demanding requisites; this is especially a problem when no prior legislation authorizes the executive agreement. Congressional-executive agreements may unduly enhance not only the President's power, but also the House of Representatives' power. Pointing to *The Federalist* and to other historical sources, the interpretivists argue that the framers intended to preclude the "fluctuating" and "multitudinous" House from participating in treaty making.<sup>28</sup>

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24. For examples of executive agreements approved by either prior or subsequent congressional action, see L. HENKIN, *supra* note 3, at 173-76; RESTATEMENT, *supra* note 16, at § 303 reporters' note 8; 14 M. WHITEMAN, *supra* note 18, at 234-40; Note, *supra* note 23, at 815-22.

25. See Berger, *supra* note 19; see also Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616 (1945) [hereinafter Borchard, *A Reply*]; Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944) [hereinafter Borchard, *Executive Agreement*]; Note, *Executive Agreements and the Intent Behind the Treaty Power*, 2 HASTINGS CONST. L.Q. 757 (1975). "Interpretivists" generally contend that judges "should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution . . . ." J. ELY, *DEMOCRACY AND DISTRUST* 1 (1980). Interpretivists may also be congressional supremacists.

26. The noninterpretivist view is epitomized by McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1 & 2), 54 YALE L.J. 181, 534 (1945), an extensive work, partly debating Borchard, *Executive Agreement*, *supra* note 25, followed by Borchard's counterattack, Borchard, *A Reply*, *supra* note 25. The McDougal and Lans article "has become a bible for defenders of executive agreements" and "did more than any other [article] to encourage wide use of executive agreements . . ." Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 N.W. U.L. REV. 577, 628, 631 (1980). "Noninterpretivists" generally claim that judges "should go beyond [the constitutional] set of references and enforce norms that cannot be discovered within the four corners of the document." J. ELY, *supra* note 25, at 1 (footnote omitted). Noninterpretivists may also be executive supremacists.

27. See U.S. CONST. arts. I & II. Regarding the interpretivist versus noninterpretivist dispute over that fact, compare Berger, *supra* note 19, at 4-7 and Borchard, *Executive Agreement*, *supra* note 25, at 678 and Borchard, *A Reply*, *supra* note 25, at 618-21 (all arguing for the importance of the Constitution's omission of executive agreements) with McDougal & Lans, *supra* note 26, at 216-26 (arguing that the Constitution's omission of executive agreements is unimportant).

28. THE FEDERALIST No. 75, at 452 (A. Hamilton) (C. Rossiter ed. 1961). John Jay wrote that those favoring a role for the House of Representatives in treaty making "seem not to recollect that such a body must necessa-

Alexander Hamilton, as "Publius," has provided a much quoted stanza: "Accurate and comprehensive knowledge of foreign politics; . . . a nice and uniform sensibility to national character; decision, *secrecy*, and dispatch, are incompatible with the genius of a body so variable and so numerous."<sup>29</sup> Constitutional text and history alike thus counsel against congressional-executive agreements.

The noninterpretivists, on the other hand, cite to the constitutional clause that prohibits states, without the Congress's consent, from "enter[ing] into any Agreement or Compact with another State, or with a Foreign Power."<sup>30</sup> By referring to international agreements other than treaties, that clause reflects the framers' understanding that nontreaty international compacts may exist. The noninterpretivists more generally oppose the interpretivists' "mechanical, filiopietistic theory, [which] purports to regard the words of the Constitution as timeless absolutes."<sup>31</sup> The noninterpretivists' position also draws upon the current practice and necessity of creating congressional-executive agreements. Given the plethora of often-mundane international accords that are needed in modern foreign affairs, it is too burdensome and time consuming to follow the treaty clause.<sup>32</sup> Furthermore, in contrast to seeking just the Senate's consent to a treaty, the majoritarian process flourishes when the entire Congress participates in authorizing executive agreements.<sup>33</sup>

Many scholars and government officials, however, articulate positions somewhat between the interpretivist and noninterpretivist extremes.<sup>34</sup> They recognize that congressional-executive agreements are a permanent fixture in the nation's foreign relations; so they instead debate the proper criteria for distinguishing between accords that may be cast as congressional-executive agreements and those that must be cast as treaties. The debate over the proper scope of congressional-executive agreements is important because the Supreme Court has put its imprimatur upon a few such agreements, but has not provided much

rily be inadequate to the attainment of those great objects, which [treaties] require to be steadily contemplated in all their relations and circumstances . . .," and the Constitution thus prudently reserves treaty making to Senators who, with longer elected terms, have "a sufficient time to become acquainted with our national concerns . . . ." THE FEDERALIST, *supra*, No. 64, at 391-92. Professor Borchard suggests that to "make the whole Congress rather than the Senate a partner in the treaty making process assumes a radical change in the Constitution . . .," Borchard, *A Reply*, *supra* note 25, at 625, and the "argument [for] 'democracy'" through full congressional participation contravenes the framers' intent and is simply "invalid." Borchard, *Executive Agreement*, *supra* note 25, at 663.

29. THE FEDERALIST, *supra* note 28, No. 75, at 452 (A. Hamilton).

30. U.S. CONST. art. I, § 10, cl. 3. See McDougal & Lans, *supra* note 26, at 221-22. The interpretivists, however, contend: "[T]he fact that the Framers explicitly authorized the States to enter into 'agreements' but omitted to do so in the case of the President implies a deliberate decision to withhold that power from him." Berger, *supra* note 19, at 39-40 (footnote omitted).

31. McDougal & Lans, *supra* note 26, at 212.

32. See *id.* at 261-306. "[T]he constitutional practice . . . does not make available all the necessary procedures" for making international agreements, *id.* at 186-87 (footnote omitted), and the executive branch "must be able to canvass [the national body politic] promptly and efficiently . . . , without being subjected to delays, obstructions, and disintegrating efforts by [senatorial] minorities . . . ," *id.* at 185-86, thus justifying executive agreements.

33. L. HENKIN, *supra* note 3, at 175; McDougal & Lans, *supra* note 26, at 572-82.

34. See, e.g., Kuchenbecker, *Agency-Level Executive Agreements: A New Era in U.S. Treaty Practice*, 18 COLUM. J. TRANSNAT'L L. 1 (1979); Miller, *Dames & Moore v. Regan: A Political Decision by a Political Court*, 29 U.C.L.A. L. REV. 1104 (1982); Murphy, *supra* note 23; Rovine, *supra* note 18; Comment, *Approval of SALT Agreements by Joint Resolution of Congress*, 21 HARV. INT'L L.J. 421 (1980).

general guidance for evaluating them.<sup>35</sup> The Congress has initiated several as yet unsuccessful efforts to regulate and control executive agreements.<sup>36</sup>

In the discourse over the latitude of congressional-executive agreements, the State Department's "Circular 175"<sup>37</sup> has gained most prominence. Circular 175 specifies multiple criteria that the executive branch considers in determining whether to pursue an international compact in the form of either a treaty or an executive agreement. Those criteria are as follows:

- a. The extent to which the agreement involves commitments or risks affecting the nation as a whole;
- b. Whether the agreement is intended to affect State laws;
- c. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
- d. Past United States practice with respect to similar agreements;
- e. The preference of the Congress with respect to a particular type of agreement;
- f. The degree of formality desired for an agreement;
- g. The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
- h. The general international practice with respect to similar agreements.<sup>38</sup>

Those criteria are relevant to determine whether a treaty or any of the three types of executive agreements is appropriate; but in practice, those criteria mostly determine whether a treaty or specifically a congressional-executive agreement is appropriate.<sup>39</sup> Circular 175 elsewhere mentions the relevance of considering whether the Constitution gives the President authority over the particular subject of an agreement;<sup>40</sup> under this Article's thesis, that topical consideration should control the form that an agreement takes. Circular 175's actual criteria, however, do not sufficiently take into account whether a specific agreement's topic falls within the Congress's article I power or the executive's article II power.

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35. *E.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (upholding congressional joint resolution authorizing executive to prohibit arms sales to particular nations); *Field v. Clark*, 143 U.S. 649 (1892) (upholding section of Tariff Act of 1890 authorizing executive to suspend exemptions on import duties); *see also* *Star-Kist Foods, Inc. v. United States*, 169 F. Supp. 268 (Cust. Ct. 1958), *aff'd*, 275 F.2d 472 (C.C.P.A. 1959) (upholding Trade Agreements Act of 1934 authorizing executive to establish foreign trade agreements).

36. *See* Rovine, *supra* note 18; Note, *supra* note 23, at 835-42. The most noteworthy legislation is probably the Case-Zablocki Act, 1 U.S.C. § 112(b) (1972), requiring the executive branch to convey all executive agreements to the Congress within 60 days of their conclusion.

37. *Treaties and Other International Agreements*, Dep't of State Foreign Affairs Manual § 700 (1974) [hereinafter *Circular 175*], reprinted in *Congressional Oversight of Executive Agreements-1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 279-301 (1975) [hereinafter *Executive Agreement Hearings*].

38. *Id.*, § 721.3, at 284-85.

39. Although § 721.3 of *Circular 175* reflects that those criteria help delineate among treaties and all genera of executive agreements, certain criteria have special relevance to congressional-executive agreements (*e.g.*, criteria c and d) and most international agreements are cast as congressional-executive agreements. *See supra* note 18.

40. *See Circular 175, supra* note 37, § 721.2, at 284; *see also* § 721.3, at 285 (concluding provision after criteria).



### C. *Sole-Executive Agreements*

Although accounting for a relatively small percentage of the executive agreements, sole-executive agreements have caused a disproportionate amount of theoretical and political controversy. Sole-executive agreements are anathema to the interpretivists<sup>41</sup> and may even give pause to some scholars who are receptive to congressional-executive agreements.<sup>42</sup> The notion of checks and balances, so important to the federal system, is inoperative when the President creates a compact without the Senate's or the Congress's acquiescence. Some sole-executive agreements have even been kept completely secret from the Congress.<sup>43</sup> Logically, under the proper topical analysis, the executive's unilateral authority to conclude these agreements must draw upon the President's enumerated powers found in article II of the Constitution.<sup>44</sup> Sole-executive agreements should be legitimate only when they concern a topic exclusively subject to Presidential control. The federal government's approach to sole-executive agreements, however, often is not predicated upon a topical approach.<sup>45</sup> The Supreme Court has impliedly approved the President's authority to compose sole-executive agreements, but it has not adequately defined, topically or otherwise, the contours of that unilateral jurisdiction.<sup>46</sup> To the extent that Circular 175 impacts upon sole-executive agreements,<sup>47</sup> its criteria, again, are not premised upon a topical approach.<sup>48</sup> Legislation now obliges the President to report sole-executive agreements to the Congress.<sup>49</sup> But this and other legislative efforts,<sup>50</sup> not based upon a topical approach, have generally failed to control and curb sole-executive agreements. In short, the debate over sole-executive agreements cries out for proper resolution.

### III. APPLYING COMPACTS: THE REINTERPRETATION DEBATE

After treaties are made, they obviously must be applied and enforced. The executive branch normally administers treaties, just as it executes all federal laws. Given its role as the daily caretaker of foreign relations,<sup>51</sup> the executive branch may particularly supervise the operation of compacts with other nations. The Congress, however, may also help to enforce international agreements. For

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41. See commentaries cited in *supra* note 25.

42. See commentaries cited in *supra* note 34.

43. See, e.g., *Executive Agreement Hearings*, *supra* note 37, at 164-67 (statement of Professor Falk, discussing the secret executive agreement between President Nixon and President Thieu of South Vietnam). Examples of covert and overt sole-executive agreements are given in L. HENKIN, *supra* note 3, at 176-84; M. WHITEMAN, *supra* note 18, at 240-55.

44. See generally E. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 116-20 (1917); L. HENKIN, *supra* note 3, at 176-84; RESTATEMENT, *supra* note 16, § 303 comment g; M. WHITEMAN, *supra* note 18, at 240-55; Note, *supra* note 23, at 824-28; *infra* notes 186-235 and accompanying text.

45. See *infra* notes 172-73 and accompanying text; see also *infra* notes 176-83.

46. See, e.g., *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); see also *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

47. See *supra* note 39 and accompanying text.

48. See *supra* notes 38, 40 and accompanying text.

49. See *supra* note 36 regarding the Case-Zablocki Act.

50. See *supra* note 36.

51. See generally L. HENKIN, *supra* note 3, at 37-65.

example, the Congress must pass whatever domestic legislation is necessary to implement the treaty; and the Congress must provide whatever funding is needed to fulfill the compact's goals. In addition, the federal judiciary has applicative jurisdiction over treaties; its authority extends to cases arising under treaties and other international agreements, since those compacts may present federal questions.<sup>52</sup> This sharing of the treaty power among the federal branches has usually not posed difficulties.

The debate over the President's authority to interpret or reinterpret the ABM and INF treaties, however, has critically shaken the Senate's and executive's relationship in governing treaties. For this Article's purpose, the issue is not really whether the deployment of the SDI or of more conventional weapons would violate the terms of those arms accords. That factual issue, on which much of the existing literature has focused, involves the more pragmatic task of treaty interpretation. This Article is instead concerned with analyzing the Senate's and the President's constitutional roles in interpreting treaties. That separation of powers analysis also need not consider the pros and cons of Star Wars or disarmament.

#### A. *The ABM Treaty*

The initial United States-USSR Strategic Arms Limitations Talks ("SALT I") produced the ABM Treaty. President Nixon and General Secretary Brezhnev signed the ABM Treaty in 1972, when it received the Senate's overwhelming consent and came into force.<sup>53</sup> The Treaty limited the parties to two ABM deployment areas each in their country (one in the nation's capital, and one elsewhere), in a way that precludes the existence or development of a national ABM defense.<sup>54</sup> A 1974 protocol permits the parties only one deployment site each.<sup>55</sup> At those sites, an ABM system, which is to "counter strategic ballistic missiles or the elements in flight trajectory,"<sup>56</sup> may contain only interceptor missiles, launchers, and radars, all of which are limited in number and capability.<sup>57</sup> Adding to those significant restrictions, the ABM Treaty precludes ABM systems that are not fixed and land-based. Article V(1) of the Treaty provides: "Each party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based."<sup>58</sup>

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52. U.S. CONST. art. III, § 2, cl. 1. See generally L. HENKIN, *supra* note 3, at 205-24; K. RANDALL, *supra* note 3, at 23-24, 59-89.

53. See ABM Treaty, *supra* note 7. See generally S. TALBOTT, *ENDGAME: THE INSIDE STORY OF SALT II* (1980); T. WOLFE, *THE SALT EXPERIENCE* (1979).

54. ABM Treaty, *supra* note 7, art. III, 23 U.S.T. at 3440; see also *id.* at art. I, 23 U.S.T. at 3438.

55. Protocol to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, July 3, 1974, art. 1, 27 U.S.T. 1645, 1646, T.I.A.S. 8276.

56. ABM Treaty, *supra* note 7, art. II, 23 U.S.T. at 3439.

57. *Id.*, arts. II-III, 23 U.S.T. at 3439-40; arts. V-VI, 23 U.S.T. at 3441-42.

58. *Id.*, art. V, ¶ 1, 23 U.S.T. at 3441.

After the ABM Treaty had been in force for over a decade, President Reagan publicly announced the concept of the SDI.<sup>59</sup> The SDI's goal, he said, was to replace the cold war notion of mutual assured destruction ("MAD"). Under MAD, the United States and the Soviet Union are each deterred from launching nuclear missiles against the other, due to the recognition and fear that the other side would automatically retaliate with a nuclear response.<sup>60</sup> Instead of resting national security "upon the threat of instant U.S. retaliation to deter a Soviet attack," why not "intercept and destroy strategic ballistic missiles before they reach[ ] our soil or that of our allies?,"<sup>61</sup> President Reagan asked in his 1983 Star Wars Speech. Totally shielding the nation, the SDI is supposed to intercept and destroy incoming Soviet ballistic missiles by using several advanced and "exotic" weapons, including laser beams, particle beams, and kinetic-energy projectiles.<sup>62</sup>

For over two years, the Reagan Administration claimed that the Star Wars concept complied with the ABM Treaty because the government was then involved in only the project's "research" phase.<sup>63</sup> Most observers both within and outside the Administration agree that the Treaty does not preclude antiballistic-missile research in even nonland-based modes.<sup>64</sup> But should the research prove successful, the United States would have to renegotiate the ABM Treaty before "developing," "testing," or "deploying" the SDI, even the executive branch initially agreed.<sup>65</sup>

The Reagan Administration, however, later changed its tune, making two different and new arguments. First, Government lawyers recommended that the United States should withdraw from the ABM Treaty because the Soviet Union had materially violated the accord. Domestic and international law permit the United States to terminate or suspend a bilateral treaty, in whole or in part, if,

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59. National Security: President Reagan's Address to the Nation, 19 WEEKLY COMP. PRES. DOC. 442 (Mar. 23, 1983) [hereinafter Reagan Address]. See generally T. LONGSTRETH, J. PIKE & J. RHINELANDER, *THE IMPACT OF U.S. AND SOVIET BALLISTIC MISSILE DEFENSE PROGRAMS ON THE ABM TREATY*, NATIONAL CAMPAIGN TO SAVE THE ABM TREATY (1985).

60. See generally A. KENNY, *THE LOGIC OF DETERRENCE* 16-18 (1985); E. RHODES, *POWER AND MADNESS* (1989); Panofsky, *The Mutual-Hostage Relationship Between America and Russia*, in *NUCLEAR STRATEGY AND NATIONAL SECURITY: POINTS OF VIEW* 74 (R. Pranger & R. Labrie, eds. 1977).

61. Reagan Address, *supra* note 59, at 447.

62. See generally Guertner, *What is Proof?*, 59 FOREIGN POL'Y 73 (1985); Dep't of Defense, *Defense Against Ballistic Missiles: An Assessment of Technologies and Policy Implications* 17-20 (1984); Fletcher, *The Technologies for Ballistic Missile Defense*, 1 ISSUES IN SCI. & TECH. 15 (1984).

63. See *Strategic Defense Initiative Program: Hearing Before the House Comm. on Armed Services*, 99th Cong., 1st Sess. (1985); *Department of Defense Appropriations for 1986: Hearings Before the Subcomm. on Defense Appropriations of the House Comm. on Appropriations*, 99th Cong., 1st Sess. 569 (1985) (statement of Gen. Abrahamson, Director of the SDI Organization) [hereinafter *Appropriations Hearings*].

64. See, e.g., Chayes & Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Capers*, 99 HARV. L. REV. 1956 (1986); Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986). These authors (the latter inside the Administration, the former currently outside) agree on little else.

65. See, *Appropriations Hearings*, *supra* note 63, at 652 (statement of Representative Dicks); *id.* at 723 (statement of Kent Stanberry, Director of Strategic Defense and Space Arms Control Policy); see also Kennedy, *Treaty Interpretation by the Executive Branch: The ABM Treaty and "Star Wars" Testing and Development*, 80 AM. J. INT'L L. 854, 856-57, 859-62 (1986); Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1368-70 (1989).

in fact, the other party has committed a material breach.<sup>66</sup> Some Republican and Democratic observers alike believe that the Soviets may well have violated the ABM Treaty.<sup>67</sup> If the Senate and the President had actually investigated this matter and together concluded that the Soviet Union had committed a material breach, then the political branches could have debated the substantive (rather than the constitutional) merits of developing, testing, and deploying the Star Wars defense. The political branches, however, did not formally examine the Soviets' alleged violations of the ABM Treaty; the Government did not pursue the option of repudiating the treaty.

The executive was thus left with its second new argument, which led to the serious and still ongoing rift between the Senate and the President. In 1985, National Security Adviser Robert McFarlane announced the Administration's new interpretation of the ABM Treaty. Under this reinterpretation, although the Treaty bars the SDI's ultimate deployment, it does not prohibit the SDI's development and testing.<sup>68</sup> This reinterpretation cut against President Reagan's initial statements and reassurances about Star Wars and the ABM Treaty—that the Government would only research the SDI, in order to comply with the ABM Treaty.<sup>69</sup> The reinterpretation also contravened the Senate's 1972 comprehension of the ABM Treaty.<sup>70</sup> The Treaty's new meaning was based upon an innovative reading of the Treaty's second article,<sup>71</sup> and upon Mr. McFarlane's debated use of an "Agreed Statement" appended to the Treaty.<sup>72</sup> The reinterpretation also drew upon State Department Legal Adviser (and former Judge) Abraham Sofaer's use of a classified record of United States-USSR negotiations over the Treaty.<sup>73</sup> That record was kept secret during the Senate's

66. See Vienna Convention, *supra* note 16, art. 60, 8 I.L.M. at 701; RESTATEMENT, *supra* note 16, § 335.

67. See, e.g., *The ABM Treaty and the Constitution: Joint Hearings Before the Senate Comm. on Foreign Relations and the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 56 (statement of Senator Nunn), 133-34 (statement of Abraham Sofaer, Department of State Legal Advisor) [hereinafter *ABM Treaty Hearings*]. See generally Gross, *Negotiated Treaty Amendment: The Solution to the SDI-ABM Treaty Conflict*, 28 HARV. INT'L L.J. 31, 52-55 (1987).

68. See *McFarlane Faults Soviet Arms Plan*, Wash. Post., Oct. 7, 1985 at A1, col. 5; see also *ABM Treaty Hearings*, *supra* note 67, at 203-18 (statement by Sidney N. Graybeal, former ABM Treaty Negotiator); R. GARTHOFF, *POLICY VERSUS THE LAW: THE REINTERPRETATION OF THE ABM TREATY* (1987); Biden & Ritch, *The Treaty Power: Upholding a Constitutional Partnership*, 137 U. PA. L. REV. 1529, 1530-36 (1989); Gross, *supra* note 67, at 46-52.

69. See *supra* notes 63-64 and accompanying text.

70. See Biden & Ritch, *supra* note 68, at 1533-36, 1541-42; see also Chayes & Chayes, *supra* note 64, at 1957-61.

71. See *supra* note 56 and accompanying text. Article II defines an ABM system, which the Administration interpreted to include the components that existed when the ABM Treaty was signed, but not necessarily to include future components. The ABM Treaty thus does not regulate the SDI's components. Sofaer, *supra* note 64, at 1974-77. But see Chayes & Chayes, *supra* note 64, at 1957-61 (disagreeing with that reading of article II, which defines prohibited systems on performance basis, not technology basis).

72. ABM Treaty, *supra* note 7, Agreed Statement D, 23 U.S.T. at 3456. According to that Statement, in the event that ABM systems become based upon physical principles other than those used in systems covered by the ABM Treaty, they will be subject to U.S.-U.S.S.R. discussions; the Administration read the Statement to mean that the Treaty does not presently regulate the SDI technologies. Sofaer, *supra* note 64, at 1975-78. Critics, however, claimed that the Agreed Statement's implied reference to future technologies was limited to land-based systems and not addressed to other basing modes. Chayes & Chayes, *supra* note 64, at 1961-63. See Kennedy, *supra* note 65, at 861-62.

73. See Sofaer, *supra* note 64, at 1978-80. See generally Glennon, *Interpreting "Interpretation": The President, The Senate, and When Treaty Interpretation Becomes Treaty Making*, 20 U. C. DAVIS L. REV. 913 (1987).

advice and consent process. Judge Sofaer's defense of the reinterpretation was connected with what has now been dubbed the "Sofaer Doctrine": "When [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations it is provided" by the executive branch.<sup>74</sup> Hence, the explanations that the executive branch officers provide during the Senate's hearing on a treaty are irrelevant to the treaty once it is in place, unless perhaps the Senate explicitly confirms its understanding of a treaty through one or more reservations or conditions to the accord. The Senate's original understanding of a treaty is, by and large, inapposite to the President's application of a treaty—even if the executive branch facilitated that original understanding. Such is the case even when the executive branch causes the Senate to misunderstand a treaty by keeping a negotiating record from the Senate. In Senate committee hearings on the reinterpretation controversy, Senator Joseph Biden exclaimed to Judge Sofaer that this doctrine was "incredible" and "absolutely staggering."<sup>75</sup> Under the Sofaer Doctrine, there is essentially no utility in having executive branch officers testify before the Senate about a pending treaty—since the executive is not bound by that testimony.

This Article's purpose, again, is not to examine whether the SDI's testing and development would technically square with the ABM Treaty, with or without the benefit of the Treaty's Agreed Statement or the secret negotiating record. But, it is clear that both sides of the controversy recognized that the executive branch was, indeed, reinterpreting the Treaty. Even Judge Sofaer conceded that he was advocating a new interpretation; his very thesis was that the executive branch is not bound by the Senate's original interpretation of a treaty. The constitutional issue, then, is whether the President can unilaterally reinterpret the ABM Treaty or any international accord, especially when the reinterpretation contradicts the Senate's understanding of the agreement during the ratification process. Urging his colleagues to adopt a resolution against the Star Wars reinterpretation, Senator Biden remarked: "First and foremost, this resolution is about the Constitution. For never before has a President sought to revise unilaterally and fundamentally the meaning of a treaty."<sup>76</sup> The constitutional quagmire was sidestepped, however, for the time being, when the executive branch finally announced that it would adhere to the ABM Treaty's original interpretation as a matter of Presidential policy, although it was not legally or constitutionally required to do so.<sup>77</sup>

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74. *ABM Treaty Hearings*, *supra* note 67, at 130 (statement of Abraham Sofaer, State Department Legal Advisor).

75. *Id.* (statement of Senator Biden).

76. *Id.* at 177 (statement of Senator Biden). The "ABM Treaty Interpretation Resolution," S. Res. 167, 100th Cong., 1st Sess. (1987), reprinted in *ABM Treaty Hearings*, *supra* note 67, at 238 (sponsored by Senator Biden), states that the Constitution requires the executive to comply with the interpretation existing during ratification, unless the Senate consents otherwise. The full Senate did not consider that resolution. See Biden & Ritch, *supra* note 68, at 1533-35.

77. The President decided not "to restructure the SDI program toward the boundaries of the broader reinterpretation which we were entitled to observe. The President made that decision as a matter of policy, not as a matter of legal requirement, and clearly reserved the right to restructure the SDI program in the future . . ." *ABM Treaty Hearings*, *supra* note 67, at 475 (statement of Richard N. Perle, Assistant Secretary of Defense for International Security).

## B. *The INF Treaty*

The controversy over Presidential treaty reinterpretation worsened with the ratification of the INF Treaty. Signed by President Reagan and Secretary Gorbachev in 1987 at their third summit, the INF Treaty seeks to eliminate the two superpowers' intermediate-range and shorter-range missiles.<sup>78</sup> This "double-zero" goal will eliminate each nation's stockpiles of such land-based missiles in geographic regions where the other party and its allies are most threatened.<sup>79</sup> Winning bipartisan support in the United States, the dismantling should reduce the risk of nuclear attack without jeopardizing NATO security. The INF Treaty will help further to thaw the cold war. The Senate gave its consent to the new accord in 1988,<sup>80</sup> but subject to a significant proviso.

Although most Senators agreed that the INF Treaty would be internationally beneficial, they were concerned that the executive branch might eventually reinterpret this agreement, just as it had the ABM Treaty. "The one legacy" of the ABM Treaty debate that the Senate Committee on Foreign Relations reported that it "could not overlook . . . was the Administration's *constitutional* assertion of a clearly delineated and unprecedented doctrine under which the President has wide latitude for treaty 'reinterpretation,' notwithstanding what the Senate may have been told in the course of granting consent to ratification."<sup>81</sup> The Committee Report continues that the Senate "was intent upon addressing and refuting this effort at executive enlargement of its share of the Treaty Power."<sup>82</sup> The Committee was not only looking forward to implementing successfully the INF Treaty and other new treaties, but also "backward . . . to a crucial constitutional provision established 200 years ago, which the Committee feels duty-bound to uphold and affirm."<sup>83</sup> Continuing their spirited denunciation of the Sofaer Doctrine from the ABM-SDI battle, Senators Biden, Byrd, and Nunn, among others, wanted the Reagan Administration's guarantee that the doctrine would not be applied to the INF Treaty.

For its part, the executive branch tried to provide some assurances to the Senate. Secretary of State George Shultz, in a letter to Senator Nunn, agreed that the testimony of executive branch witnesses and submissions on the INF Treaty "can be regarded by the Senate as authoritative;" that the meaning presented by the executive branch to the Senate would be "authoritative without the necessity of the Senate's incorporating that testimony and material in its Resolution of Ratification through understandings, reservations, amendments, or other conditions;" and that "the Reagan Administration will in no way depart from the INF Treaty as we are presenting it to the Senate."<sup>84</sup>

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78. See INF Treaty, *supra* note 9. See generally SENATE COMM. ON FOREIGN RELATIONS, THE INF TREATY, S. EXEC. REP. NO. 15, 100th Cong., 2d Sess. (1988) [hereinafter INF TREATY REPORT].

79. See INF TREATY REPORT, *supra* note 78, at 11-22.

80. See 134 CONG. REC. S6937 (daily ed. May 27, 1988).

81. INF TREATY REPORT, *supra* note 78, at 89.

82. *Id.*

83. *Id.*

84. Letter from Secretary Shultz (Feb. 9, 1988), *reprinted in id.* at 442.

Subsequent communications from the executive branch to the Senate, however, undercut Secretary Shultz's initial message.<sup>85</sup> The executive branch not only asserted that it was unable to bind later presidents with the Treaty's current understanding, but that it was perhaps still wedded to the Sofaer Doctrine. Arthur Culvahouse, President Reagan's Counsel, conceded that a treaty's interpretation is binding when the executive shares that interpretation with the Senate, but only when that interpretation had been "authoritatively" communicated and "clearly intended" by the President, and had been "generally understood and relied upon" by the Senate during ratification.<sup>86</sup> When those requisites are not met, nothing impedes the President's discretion in later redefining a treaty's meaning. According to the Senate, that restrictive view of a treaty's original meaning smacked of Judge Sofaer's ideas.<sup>87</sup> Although the Senate and the executive continued debating their proper functional roles in interpreting and applying treaties, they did not focus on the topic of the INF and ABM treaties — disarmament; this Article will later demonstrate that a topical analysis is essential to the reinterpretation debate, just as it is to the executive-agreement controversy.<sup>88</sup>

Dissatisfied with the executive's position, particularly the increased prominence of Mr. Culvahouse's viewpoint, the Senate eventually adopted the Biden Condition to the INF Treaty Resolution of Ratification.<sup>89</sup> The Condition, which Senator Biden drafted and Senator Byrd revised, reads: "[T]he United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification."<sup>90</sup> That common understanding should be based upon the INF Treaty's text; the Senate's resolution of ratification; and the representations that the President and other executive branch officers provided to the Senate and its committees when seeking ratification consent.<sup>91</sup> The Biden Condition also provides that the United States "shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute."<sup>92</sup>

The Reagan Administration criticized the Biden Condition. In the main, Mr. Culvahouse claimed that the condition would "grant the Senate a role in interpreting treaties not contemplated by the Constitution."<sup>93</sup> By requiring the Senate's approval of the INF Treaty's reinterpretation, the condition "interferes with the President's constitutional responsibility to interpret and implement treaties and also constitutes an unprecedented arrogation of treaty power by the

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85. See generally *id.* at 94-100, 443-46; Koplow, *supra* note 65, at 1376-78.

86. Letter from White House Counsel Culvahouse (Mar. 17, 1988), reprinted in INF TREATY REPORT, *supra* note 78, at 443 [hereinafter *Culvahouse Letter*].

87. See *supra* note 74 and accompanying text.

88. See *infra* notes 186-90 and accompanying text (topical analysis specifically of disarmament accords).

89. 134 CONG. REC. S6724 (daily ed. May 26, 1988). See INF TREATY REPORT, *supra* note 78, at 96-100; Biden & Ritch, *supra* note 68, at 1544-54.

90. 134 CONG. REC. S6724 (Condition A) (daily ed. May 26, 1988).

91. See *id.* (Condition B).

92. See *id.* (Condition C).

93. *Culvahouse Letter*, *supra* note 86, at 444.

Senate.”<sup>94</sup> Mr. Culvahouse asserted that the need for Senate approval “seemingly would occur each time implementation of the treaty calls into question any Executive statement in the massive ratification record.”<sup>95</sup> Despite these objections to the Biden Condition, President Reagan exchanged ratification instruments with Secretary Gorbachev.

Within about a week, however, President Reagan wrote to the Senate that the Biden Condition “causes me serious concern.”<sup>96</sup> “I cannot accept the proposition that a condition in a resolution to ratification can alter the allocation of rights and duties under the Constitution; nor could I . . . accept any diminution claimed to be effected by such a condition in the constitutional powers and responsibilities of the Presidency.”<sup>97</sup> The President wrote also that “the principles of treaty interpretation recognized and repeatedly invoked by the courts may not be limited or changed by the Senate alone . . .” and “the Supreme Court may well have the final judgment, which would be binding on the President and Senate alike.”<sup>98</sup> As one would expect, the Senate disagreed with President Reagan’s communication, not only on substantive constitutional grounds, but because the President had signed the INF Treaty with the Biden Condition attached.<sup>99</sup> The Senate sought again to reassert its constitutional role in treaty interpretation and to criticize the President’s tactics in the ABM and INF treaty debates. Since President Reagan said that he would not deviate from the original INF interpretation, however, the difference of views on the Biden Condition may not “have any practical effect on the implementation of the Treaty.”<sup>100</sup> The constitutional dilemma over treaty interpretation is thus now at a stalemate.

#### IV. UNMAKING TREATIES: THE TERMINATION DEBATE

Termination is the final step in shaping the nation’s treaty commitments.<sup>101</sup> The Constitution offers absolutely no express guidance about whether the President, the Senate, or the President and the Senate together can terminate treaties and other compacts. Most international instruments contain provisions about whether and how the parties may terminate those agreements. In the absence of such a provision, the Vienna Convention on the Law of Treaties may provide “gap fillers” about terminating treaties.<sup>102</sup> Those treaty termination vehicles, however, regulate the parties’ international relationship in renouncing treaties. Again, the relationship among nations, and the international law governing that relationship, is systemically distinct from the relationship between the Senate and the President concerning the treaty power, which is governed by

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94. *Id.*

95. *Id.*

96. 24 WEEKLY COMP. PRES. DOC. 779, 780 (June 13, 1988).

97. *Id.* at 780.

98. *Id.* at 780.

99. *Reagan Assails Senate on Treaty Condition*, N.Y. Times, June 11, 1988, at A6, col. 1.

100. 24 WEEKLY COMP. PRES. DOC. 779, 780-81 (June 13, 1988).

101. See *Treaty Termination Hearings*, *supra* note 6, at 390-91 (statement of Professor Michael Reisman) (describing the termination sequence in the overall shaping of agreements).

102. See Vienna Convention, *supra* note 16, arts. 54-57, 1155 U.N.T.S. at 344-45, 8 I.L.M. at 699-700.



constitutional law.<sup>103</sup> So even if international law would permit the United States to terminate a particular treaty, there remains the constitutional question of which branch or branches may decide to unmake that treaty. The Constitution does not provide an explicit answer to that important question.

President Carter's repudiation of the United States' Mutual Defense Treaty with Taiwan instigated the treaty termination controversy. The two nations negotiated that Treaty in 1954 on the heels of the Chinese Revolution and the Korean War. Reacting to the PRC's possible threat against Taiwan and its Pacific territories, as well as the United States' Pacific territories, the Treaty obligated the parties "to meet the common danger" in helping to defend each other.<sup>104</sup> The Treaty declared "that no potential aggressor [should] be under the illusion that either [the United States or Taiwan] stands alone in the West Pacific Area."<sup>105</sup> Created pursuant to the United States Mutual Defense Assistance Act of 1949 ("Mutual Defense Act"),<sup>106</sup> the Treaty also obligated the parties jointly and separately to develop their defensive capabilities.<sup>107</sup> The United States and Taiwan, in short, aspired "to strengthen their . . . collective defense for the preservation of peace and security pending the development of a more comprehensive system of regional security in the West Pacific Area . . . ."<sup>108</sup> The Senate gave its advice and consent to the instrument's ratification, and the Mutual Defense Treaty entered into force in 1955.

Officials of both Taiwan and the PRC assert that they alone represent China's true and legal government. During the 1970's, the United States, along with the NATO allies, began to improve relations with the PRC. President Nixon visited the PRC with much pomp, circumstance, and the wise objective of normalized relations.<sup>109</sup> The PRC, however, would not agree to formal and complete diplomatic recognition of the United States, unless our nation ended its official relations with Taiwan, including the termination of the Mutual Defense Treaty. In 1978, given the long and stable relationship between the United States and Taiwan, the Congress passed the Dole-Stone Amendment,<sup>110</sup> premised upon "the responsibility of the Senate to give its advice and consent to treaties entered into by the United States."<sup>111</sup> Part of the International Security Assistance Act of 1978,<sup>112</sup> the Dole-Stone Amendment provides: "It is the sense of the Congress that there should be prior consultation between the Congress

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103. Cf. *supra* notes 16-17 and accompanying text (discussing the dichotomy between the international and constitutional systems concerning the creation of international agreements).

104. Mutual Defense Treaty, *supra* note 12, art. V, 6 U.S.T. at 436.

105. *Id.*, preface, 6 U.S.T. at 435.

106. See Mutual Defense Assistance Act of 1949, Pub. L. No. 81-329, § 402, 63 Stat. 714 (1949).

107. Mutual Defense Treaty, *supra* note 12, art. II, 6 U.S.T. at 436.

108. *Id.*, preface, 6 U.S.T. at 435.

109. See generally Pappas, *The Constitutional Allocation of Competence in the Termination of Treaties*, 13 N.Y.U. J. INT'L L. & POL. 473, 473-76 (1981); *Legal Implications of Recognition of the People's Republic of China*, 1978 PROC. AM. SOC'Y INT'L L. 240; Scheffer, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19 HARV. INT'L L.J. 931, 937-44 (1978).

110. International Security Assistance Act of 1978, § 26(b), 22 U.S.C. § 2151 (1978) [hereinafter International Security Act].

111. *Id.*

112. International Security Act, *supra* note 110, Pub. L. No. 95-384, 92 Stat. 730 (codified in scattered sections of 22 U.S.C.).

and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954."<sup>113</sup>

Two months later in 1978, President Carter announced that the United States would cease to recognize Taiwan and would instead recognize the PRC as China's legitimate and sole government.<sup>114</sup> He also announced that the United States would terminate the Mutual Defense Treaty, pursuant to article X of the Treaty. Although that provision states that the "Treaty shall remain in force indefinitely," it allows that "[e]ither Party may terminate it one year after notice has been given to the other Party."<sup>115</sup> The United States still maintains cultural, commercial, and other unofficial relations with Taiwan; prior treaties and executive agreements between the United States and Taiwan also remain in force, save the Mutual Defense Treaty.<sup>116</sup> In terminating that Treaty, however, President Carter did not seek senatorial or congressional approval. He did not comply with the Dole-Stone Amendment.

In a case called *Goldwater v. Carter*,<sup>117</sup> members of both Houses of Congress sued the executive branch. Suing in the United States District Court in the District of Columbia, the plaintiffs sought declaratory and injunctive relief to prevent the termination of the Mutual Defense Treaty. The plaintiffs alleged that President Carter violated his duty to uphold United States treaties; that the Constitution does not allow the President unilaterally to terminate treaties; that article X of the Mutual Defense Treaty intends that the United States, not the executive, is the "party" that may terminate the accord; and that President Carter violated the International Security Assistance Act of 1978.<sup>118</sup> The district court initially dismissed the action for lack of standing, but without prejudice.<sup>119</sup> After the Congress had made sufficient legislative efforts to evidence that it wanted to participate in terminating mutual defense treaties, the district court then found that the Congress would suffer a sufficient injury if the accord with Taiwan was terminated without congressional consent.<sup>120</sup> Having

113. International Security Act, *supra* note 110, § 26(b), 22 U.S.C. § 2151 (1978).

114. Joint Communiqué on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China (January 1, 1979), 14 WEEKLY COMP. OF PRES. DOC. 2264 (Dec. 18, 1978).

115. Mutual Defense Treaty, *supra* note 12, art. X, 6 U.S.T. at 437. See 14 WEEKLY COMP. OF PRES. DOC. 2266 (Dec. 15, 1978).

116. See 14 WEEKLY COMP. OF PRES. DOC. 2275 (Dec. 18, 1978). See generally Scheffer, *supra* note 109, at 937-42.

117. *Goldwater v. Carter*, 481 F. Supp. 949 (D.D.C.), *rev'd per curiam*, 617 F.2d 697 (D.C. Cir.) (*en banc*), *vacated and remanded with directions to dismiss*, 444 U.S. 996 (1979). See generally D. ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* 248-306 (1986); Henkin, *Litigating the President's Power to Terminate Treaties*, 73 AM. J. INT'L L. 647 (1979). For a study of the various ways in which the United States has terminated treaties, with or without legislative acquiescence, see Emerson, *The Legislative Role in Treaty Abrogation*, 5 J. LEGIS. 46 (1978). That study actually shows that treaty termination practice has been inconsistent, although that study's author, who was Counsel to Senator Goldwater, favors the Senate's participation in treaty termination. See also *Termination of Treaties: The Constitutional Allocation of Power — Materials Compiled by the Senate Committee on Foreign Relations*, 95th Cong., 2d Sess. 1-21 (1978) (lists of withdrawals from U.S. treaties).

118. See *Goldwater*, 617 F.2d at 701.

119. That dismissal, by Memorandum-Order dated June 6, 1979, was not published, but is discussed in *Goldwater*, 481 F. Supp. at 950-56.

120. *Goldwater*, 481 F. Supp. at 950-56. The legislative evidence included senatorial proposals to that effect. *Id.* at 953-55.

upheld the plaintiffs' standing, and ruling that the case did not raise a nonjusticiable political question,<sup>121</sup> the district court ruled in the Congress's favor. Although the Constitution and the case law is not dispositive of the treaty termination issue, the district court found: "Taken as a whole, the historical precedents support rather than detract from the position that the power to terminate treaties is a power shared by the political branches of this government."<sup>122</sup>

The United States Court of Appeals for the District of Columbia reversed. Sitting en banc and issuing a per curiam opinion, the appellate court validated President Carter's unilateral treaty termination on various constitutional grounds.<sup>123</sup> Since the court viewed "the issue before us so narrowly and in the circumstances of this treaty," it viewed the case to be justiciable.<sup>124</sup> The court noted that, when giving its advice and consent, the Senate did not expressly reserve a role for itself in terminating the Mutual Defense Treaty.<sup>125</sup> Although not "minimizing the role of the legislature in foreign affairs,"<sup>126</sup> the court concluded that the Constitution did not nullify the treaty termination procedure followed by the executive in this particular instance.<sup>127</sup> A dissenting judge, strenuously arguing that the Senate has an inherent constitutional role in treaty termination, would have affirmed the district court's decision.<sup>128</sup>

On an expedited basis, the United States Supreme Court considered the *Goldwater* case without hearing oral argument.<sup>129</sup> The Supreme Court, however, did not provide any real substantive guidance about which branch or branches of the federal government may terminate treaties. Articulating a very expansive approach to the political question doctrine, Justice Rehnquist opined that the court of appeals' judgment should be vacated and the case dismissed.<sup>130</sup> The case was nonjusticiable "because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President."<sup>131</sup> But Justice Rehnquist could convince only three justices that the case presented

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121. *Id.* at 956-58.

122. *Id.* at 960.

123. *Goldwater*, 617 F.2d at 697.

124. *Id.* at 709. Chief Judge Wright and Circuit Judge Tamm concurred in the result, but voted to vacate the district court order and to dismiss the complaint because the appellees lacked standing. *Id.* at 709 (Wright, C.J. concurring).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 716 (MacKinnon, C.J., dissenting from the result; concurring that appellees have standing and that case is justiciable).

129. *Goldwater*, 444 U.S. at 996.

130. *Id.* at 1002-06 (Rehnquist, J., concurring). K. RANDALL, *supra* note 3, at 105-06, critically examines the political question doctrine in *Goldwater*. For valuable critiques of the doctrine in general or in the foreign affairs context, see Champlin & Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215 (1985); Cole, *Challenging Covert War: The Politics of the Political Question Doctrine*, 26 HARV. INT'L L.J. 155 (1985); Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135 (1970).

131. *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring).

a nonjusticiable political question, while other justices adamantly disagreed.<sup>132</sup> Two members of the Court concurred with the Rehnquist plurality's result to dismiss the complaint, but not under the political question doctrine.<sup>133</sup> Two other members would have set the case for oral argument and plenary consideration.<sup>134</sup>

Only one member of the Court, Justice Brennan, voted presently to reach the case's merits. Dissenting from the order directing dismissal, Justice Brennan wrote that "[t]he constitutional question raised here [may be] prudently answered in narrow terms," and "[t]he issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion . . ."<sup>135</sup> Justice Brennan's brief opinion would have affirmed the court of appeals' pro-executive judgment, "insofar as it rests upon the President's well established authority to recognize, and withdraw recognition from, foreign governments."<sup>136</sup> In short, although only one justice (Brennan) favored the President on substantive constitutional law grounds, the Congress lost its case. In January 1980, President Carter's termination of the Mutual Defense Treaty became effective.

Three principal arguments have been at the forefront of the treaty termination debate. These arguments have emerged from the district and circuit court opinions in *Goldwater*, from the Senate Committee on Foreign Relations' hearings on treaty termination, and from commentaries.<sup>137</sup> Not sufficiently focused upon a topical analysis of particular compacts, these arguments do not adequately answer the question of which federal branch or branches can constitutionally terminate treaties.

#### A. *The Sole Organ Argument*

The executive supremacists argue that the President may terminate treaties because the President is the nation's "sole organ" in foreign relations.<sup>138</sup> The sole organ argument draws upon a term that Justice Sutherland once borrowed from a speech by John Marshall before the House of Representatives regarding

132. Chief Justice Burger and Justices Stewart and Stevens joined Justice Rehnquist's opinion. See *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring). Justices Powell, *id.* at 998-1002 (Powell, J., concurring), and Brennan, *id.* at 1006-07 (Brennan, J., dissenting), criticized the plurality's application of the political question doctrine, as discussed in K. RANDALL, *supra* note 3, at 105-06. See also *infra* note 135 and accompanying text.

133. Justice Powell voted to dismiss the case as not being ripe for review, *Goldwater*, 444 U.S. at 997-98 (Powell, J., concurring), and Justice Marshall concurred in the result to dismiss without explanation. See *id.* at 996.

134. *Id.* at 1006 (Blackmun, J., dissenting in part, joined by White, J.).

135. *Id.* at 1007 (Brennan, J., dissenting). Justice Brennan opined that *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court's seminal political question decision, which he authored, did not render *Goldwater* nonjusticiable. See *infra* notes 251-53 and accompanying text.

136. *Goldwater*, 444 U.S. at 1006 (Brennan, J., dissenting). Justice Brennan thus here makes passing reference to the Mutual Defense Treaty's topic. See *infra* notes 199-208 and accompanying text for a more extensive topical analysis of mutual defense treaties, including disagreement with Justice Brennan's conclusion.

137. See generally *Goldwater*, 481 F. Supp. 949, *rev'd per curiam*, 617 F.2d 697, *vacated and remanded with directions to dismiss*, 444 U.S. 996 (1979); *Treaty Termination Hearings*, *supra* note 6; commentaries cited in *supra* notes 109, 117; *infra* notes 138-70.

138. See *Goldwater*, 617 F.2d at 706-07; Points and Authorities in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, *Goldwater*, 481 F. Supp. at 949, *reprinted in Treaty Termination Hearings*, *supra* note 6, at 99 [hereinafter *Defendants' Motion*].

an extradition matter. In *United States v. Curtiss-Wright Export Corp.*,<sup>139</sup> which upheld a joint resolution of Congress that authorized the President to prohibit the sale of arms to certain countries, Justice Sutherland wrote: "In this vast external realm, with its . . . manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . As Marshall said, . . . 'The President is the *sole organ* of the nation in its external relations, and its sole representative with foreign nations.'"<sup>140</sup> The circuit court in *Goldwater* quoted that "oft-repeated language" in justifying the "vitality" of the President's foreign affairs power to terminate treaties.<sup>141</sup>

But any literal reliance on the sole organ phrase is misplaced in the treaty termination setting, the congressional supremacists contend. Not only was Marshall's statement made in a very different context, but *Curtiss-Wright* was a case in which the executive had acted under a congressional delegation and not unilaterally in foreign affairs.<sup>142</sup> "Ironically, [*Curtiss-Wright*], which proceeded from a congressional authorization, has been employed to tear down the authority of Congress."<sup>143</sup> As Professor Raoul Berger even more harshly puts it: "Repetition cannot improve a nonjudicial dictum torn from context by a Justice—Sutherland—who has never been regarded as a shining legal light."<sup>144</sup>

The disagreement over the sole organ doctrine more generally concerns the debate about the political branches' respective roles in foreign affairs. At the constitutional convention, and in the famous debate between "Helvidius" and "Pacificus" (Madison and Hamilton), statespersons argued about which branch should possess the greatest foreign affairs power.<sup>145</sup> Although the President can arguably claim more of that power under article II of the Constitution, the Congress can surely claim significant foreign affairs power under article I.<sup>146</sup> Even if the President is the chief executive of foreign policy, the congressional supremacists demonstrate that the executive branch is not the nation's sole organ, or the only relevant department, in formulating foreign relations.

If the President were the sole organ in treaty making, then the Constitution would not have provided for the Senate's advice and consent role. The Congress can also supersede treaties by passing subsequent preemptive or inconsistent legislation.<sup>147</sup> In addition, the congressional supremacists point to the fact that the Constitution was initially drafted to vest the treaty making power exclusively in the legislative branch; only at a relatively late moment was the Presi-

139. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

140. *Id.* at 319, quoting Marshall, 10 ANNALS OF CONG. 613 (1800) (emphasis added). For background on Marshall's statement, see Berger, *supra* note 26, at 589-91.

141. *Goldwater*, 617 F.2d at 706-07.

142. See Berger, *supra* note 26, at 591; *supra* note 140 and accompanying text.

143. Berger, *supra* note 26, at 591.

144. *Id.* at 590.

145. See generally A. HAMILTON, THE LETTERS OF PACIFICUS AND HELVIDIUS (reprinted 1976); Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties — The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1, 73-106 (1979); Comment, *Resolving Treaty Termination Disputes*, 129 U. PA. L. REV. 1189, 1195-1201 (1981).

146. See generally L. HENKIN, *supra* note 3, at 67-88; K. RANDALL, *supra* note 3, at 17.

147. See RESTATEMENT, *supra* note 16, § 115.

dent included in the treaty clause.<sup>148</sup> That fact contradicts the notion of superior Presidential authority to make, remake, or unmake international compacts without Senate approval. The idea that the President's treaty power is not unilateral, but shared, also draws famous support from Hamilton's *The Federalist* No. 75: "The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise . . . to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of . . . [the] President . . ."<sup>149</sup> Hamilton's influential observation obviously undercuts the sole organ argument for Presidential treaty termination.<sup>150</sup>

Unconvinced, however, the executive supremacists can point to the fact that the framers eventually decided to insert the treaty clause in the President's constitutional article (article II), not in the Congress's article (article I).<sup>151</sup> That fact purportedly supports the executive's predominant treaty power. They also take solace from Professor Louis Henkin's suggestion that "perhaps the Framers were concerned only to check the President in '*entangling*' the United States. . . ."<sup>152</sup> in the *making* of treaties. "[*D*]isentangling," or *unmaking* treaties, "is less risky and may have to be done quickly . . ."<sup>153</sup> And "since the President acts for the United States internationally he can effectively terminate or violate treaties, and the Senate has not established its authority to join or veto him."<sup>154</sup> Unless effectively stopped, the executive remains the sole organ in treaty termination, the executive supremacists conclude.

### B. *The Supremacy Clause Argument*

The supremacy clause is the focus of a second argument between the congressional supremacists and the executive supremacists. According to the former, since article VI of the Constitution makes treaties "the supreme law of the land," the President may not terminate, but must enforce, treaties.<sup>155</sup> Treaties are the equivalent of other federal laws in the hierarchy of United States law;<sup>156</sup> as such, treaties should be repealed in the same way as other federal laws are repealed—by a legislative enactment. Although the Constitution does not expressly advise about how to repeal federal statutes, it is assumed, under the supremacy clause, that only legislative action can void a statute; the congressional supremacists contend the same is true concerning treaties. Since the Senate's consent is needed to make treaties, that consent is also needed to unmake

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148. See Berger, *supra* note 26, at 581-82. See generally Bestor, *supra* note 145, at 88-131.

149. THE FEDERALIST, *supra* note 28, No. 75, at 451 (A. Hamilton). See generally D. ADLER, *supra* note 117, at 89-93.

150. Hamilton is not, however, purely a congressional supremacist. Although he wrote that the treaty power "partake[s] more of the legislative than of the executive character," he also thought that "it does not seem strictly to fall within the definition of either of them." THE FEDERALIST, *supra* note 28, No. 75, at 450 (A. Hamilton).

151. See *Defendants' Motion*, *supra* note 138, at 100-01, 120-23. See generally, L. HENKIN, *supra* note 3, 129-71.

152. L. HENKIN, *supra* note 3, at 169 (emphasis added).

153. *Id.* (emphasis added).

154. *Id.* (footnote omitted). See also Goldwater, 617 F.2d at 704; D. ADLER, *supra* note 117, at 96-97.

155. U.S. CONST. art. VI, cl. 2. See D. ADLER, *supra* note 117, at 101; Berger, *supra* note 26, at 597-98.

156. RESTATEMENT, *supra* note 16, § 115, reporters' note 1.

treaties. Actually, this prolegislative position might support the entire Congress's participation in treaty termination, not just the Senate's participation.<sup>157</sup>

According to the executive supremacists, however, the supremacy clause argument just "plays with words."<sup>158</sup> Professor Henkin has written that article VI "is addressed to the courts, and principally for the purpose of declaring treaties supreme in relation to state law and policy."<sup>159</sup> Rather than supporting a legislative role in treaty termination, article VI addresses federalism concerns, not separation of powers concerns. Arguing for symmetrical treatment in the repealing of federal statutes and treaties belies the inherent difference between treaties and other federal laws. Treaties are international instruments, which may not have any domestic implications, conclude the executive supremacists.<sup>160</sup> Especially if the President is the sole organ in international relations,<sup>161</sup> the executive branch may terminate international compacts, irrespective of the supremacy clause.

### C. *The Removal Argument*

The final major point of contention concerns an analogy that the executive supremacists draw between treaty termination and the removal of executive officers. The same clause in article II of the Constitution empowers the President, with the Senate's advice and consent, both to make treaties and to appoint "Ambassadors, other public Ministers and Consuls, . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for."<sup>162</sup> That clause does not expressly say how either treaties or executive appointments should be undone. In *Myers v. United States*,<sup>163</sup> the Postmaster General, with President Wilson's approval, unilaterally removed an Oregon postmaster, despite a statute that required senatorial consent to remove postmasters. Favoring the executive branch, the Supreme Court invalidated that statute, broadly deciding that the "power to remove . . . executive officers . . . is an incident of the [President's] power to appoint them, and is in its nature an executive power."<sup>164</sup> Since *Myers* held that the Senate's consent to the removal of executive officers is inappropriate, the executive supremacists argue, by analogy, that the Senate's consent to treaty termination is also inappropriate. Article II explicitly requires the Senate's consent only to the making of treaties and executive officer appointments, and, if senatorial consent is unnecessary to terminate Presidential appointments, it is unnecessary to terminate treaties.

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157. See D. ADLER, *supra* note 117, at 101. See generally Berger, *supra* note 26, at 620-22.

158. Henkin, *supra* note 117, at 653.

159. *Id.*

160. *Id.*; see also *Defendants' Motion*, *supra* note 138, at 138-39.

161. See *supra* notes 138-44 and accompanying text.

162. U.S. CONST. art. II, § 2, cl. 2. See *Defendants' Motion*, *supra* note 138, at 123-25; see also Goldwater, 617 F.2d at 703-04.

163. *Myers v. United States*, 272 U.S. 52 (1926).

164. *Id.* at 161.

On the other hand, the congressional supremacists cite to the Supreme Court's subsequent decision in *Humphrey's Executor v. United States*.<sup>165</sup> President Roosevelt had unilaterally removed a member of the Federal Trade Commission "without assigning any cause therefor,"<sup>166</sup> rather than acting under a statute that allowed the President to remove a commissioner only "for inefficiency, neglect of duty, or malfeasance in office."<sup>167</sup> In *Humphrey's Executor*, the Court ruled against the President because the commission's "duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative."<sup>168</sup> Hence, the executive may not unilaterally remove even a presidentially appointed official against the terms of a statute, when that official functions in a nonexecutive capacity. The congressional supremacists not only cite to *Humphrey's Executor* as having diluted and narrowed *Myers*, but generally argue against the analogy between terminating treaties and removing officers. As Professor Berger puts it: "[T]reaty terminations go beyond [the President's] relations to his subordinates; they affect our relations to other nations and are of immediate concern to the people and to Congress."<sup>169</sup> He rhetorically asks: "Who would assimilate termination of the North Atlantic Alliance to firing a member of the Cabinet?"<sup>170</sup> Since the Supreme Court decided that *Goldwater* was nonjusticiable, however, there has been no definitive judicial answer about whether the executive or congressional supremacists are "correct" concerning the removal argument.

## V. A TOPICAL ANALYSIS OF THE TREATY POWER

The modern debates over treaty interpretation and treaty termination obviously need resolution. Those debates will continue to obstruct the federal government's ratification, implementation, and termination of significant treaties. Numerous old and new treaties, having myriad foreign policy implications, are in jeopardy. As former Secretary of State Dean Rusk warned, when testifying about the Mutual Defense Treaty: "Here we are at the gates of that slippery slope toward the impasse which could paralyze our constitutional system."<sup>171</sup>

Most observers have simply taken either a pro-Senate or a pro-President view of these controversies. The congressional supremacists claim that reinterpreting and terminating treaties exclusively involve legislative functions,<sup>172</sup> while the executive supremacists claim that those acts exclusively involve execu-

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165. *Humphrey's Executor v. United States*, 295 U.S. 602 (1934). See D. ADLER, *supra* note 117, at 95-96; Berger, *supra* note 26, at 595-97.

166. *Humphrey's Executor*, 295 U.S. at 622.

167. *Id.*

168. *Id.* at 624.

169. Berger, *supra* note 26, at 595-96.

170. *Id.* at 596. See generally Bestor, *supra* note 145, at 23-30.

171. *Treaty Termination Hearings*, *supra* note 6, at 370-71 (statement of former Secretary of State Dean Rusk).

172. See, e.g., Berger, *supra* note 19 (executive agreements); Biden & Ritch, *supra* note 68 (interpreting international agreements); Berger, *supra* note 26 (terminating international agreements).



tive functions.<sup>173</sup> It is a mistake, however, to take rigid, functionalist approaches to treaty interpretation and termination. The Constitution does not expressly assign the interpretation and termination functions to either the Senate or to the President. Both interpretivist and noninterpretivist arguments about these functions tend to cancel each other out, as the previous sections have demonstrated.<sup>174</sup> The federal government will not resolve the reinterpretation and termination controversies by analyses supporting either the Senate's or the President's functional domination of the treaty power.

In analyzing the treaty power, it is likewise a mistake to seek much guidance from the Burger and Rehnquist Courts' separation of powers decisions. These well publicized opinions have concerned the constitutionality of the following: The one House legislative veto;<sup>175</sup> the Comptroller General's role under the Gramm-Rudman-Hollings Act;<sup>176</sup> the Commodity Futures Trading Commission's adjudication of state law counterclaims;<sup>177</sup> the independent counsel sections of the Ethics in Government Act of 1979;<sup>178</sup> and the United States Sentencing Commission's Sentencing Guidelines.<sup>179</sup> Most commentators have correctly criticized those opinions as being hopelessly inconsistent.<sup>180</sup> The opinions posit contradictory originalist and nonoriginalist views of separation of powers, displaying very different levels of constitutional deference to the different governmental actors under attack.<sup>181</sup> The doctrinal deficiencies of these cases render them unhelpful in examining any separation of powers problem, including treaty interpretation and termination.

Indeed, the Supreme Court's separation of powers decisions may be particularly unhelpful in reconciling the treaty power. To the extent that these decisions involve any acceptable organizing principle, the most recent cases arguably rest upon the following premise: A federal actor violates the separation of powers when it reduces or reassigns another branch's governmental functions in

173. See, e.g., McDougal & Lans, *supra* note 26 (executive agreements); Sofaer, *Treaty Interpretation: A Comment*, 137 U. PA. L. REV. 1437 (1989) (interpreting international agreements); Henkin, *supra* note 117 (terminating international agreements).

174. See *supra* notes 24-49, 66-77, 81-100, 117-70 and accompanying text.

175. *I.N.S. v. Chadha*, 462 U.S. 919 (1982).

176. *Bowsher v. Synar*, 478 U.S. 714 (1986).

177. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

178. *Morrison v. Olson*, 487 U.S. 654 (1988).

179. *Mistretta v. United States*, 488 U.S. 361 (1989).

180. See, e.g., Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083 (1987); Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989); Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta*, 39 DE PAUL L. REV. 299 (1989); Werhan, *Toward an Eclectic Approach to Separation of Powers: Morrison v. Olson Examined*, 16 HASTINGS CONST. L.Q. 393 (1989).

181. See generally Chemerinsky, *supra* note 180; Lewis, *Limits on Presidential Power*, 49 U. PITT. L. REV. 745, 750-51 (1988); Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987); Comment, *Morrison v. Olson: Renewed Acceptance for a Functional Approach to Separation of Powers*, 16 HASTINGS CONST. L.Q. 603 (1989). "Originalism" and "non-originalism" are roughly the equivalents of interpretivism and noninterpretivism. See *supra* notes 25-26. The opinions generally take a rigid approach to the separation of powers when the Congress is the defendant, strictly keeping the legislature within the confines of article I of the Constitution, (see, e.g., *Chadha*; *Bowsher*), but a flexible approach when there is a noncongressional defendant (see, e.g., *Mistretta*; *Morrison*).

order to enhance its own power over those functions.<sup>182</sup> But even if that organizing principle exists, it does not illuminate the treaty power debate, since the Constitution does not expressly assign the reinterpretation and termination functions to either the Senate or the President. The Supreme Court cases have challenged governmental behavior that is generally recognized as being within a particular branch's functional province; the cases concern whether a different branch can perform or control that function.<sup>183</sup> The treaty context, however, raises the more basic question of which branch can constitutionally undertake the function of interpreting and terminating treaties. The authority to perform those treaty functions is not sufficiently recognized as being executive or legislative in nature. Hence, without more guidance from the Constitution about whether the Senate or the President can reinterpret or terminate treaties, any functionalist analysis of the treaty clause will only prolong the inconclusive battle between the executive supremacists and the congressional supremacists.

As an alternative to a behavioral or functionalist analysis, this Author recommends a topical analysis of the treaty power. The key is to determine whether the legislative or executive branch has authority over the specific topic at issue in a particular international agreement. The starting point for that inquiry is to clarify the constitutionality of executive agreements. After all, the decision about whether a compact may be undertaken as a type of executive agreement, rather than as a treaty, is the first step in the constitutive process of forming the United States' international commitments. Decisions about interpreting and terminating agreements represent the second and third steps.<sup>184</sup> Linking the ongoing controversy over executive agreements to the modern debates over treaty interpretation and termination, this Author suggests that a topical approach can effectively provide a comprehensive solution to all problematical aspects of the treaty process.

The topical analysis tries to avoid bias in either the Senate's or the President's favor. It tries objectively to decipher the legislative and executive branches' foreign affairs powers under, respectively, articles I and II of the Constitution. If article II gives the President authority over a specific international topic—and if article I says nothing about that topic—the President may create sole-executive agreements on that topic. It follows that the President can also reinterpret or terminate such sole-executive agreements, without senatorial acquiescence, since the President has exclusive jurisdiction over the topics of those agreements. Hence, the President has unilateral authority to make, reinterpret,

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182. See *Morrison*, 487 U.S. at 693; *Bowsher*, 478 U.S. at 725. See generally Rosenberg, *Congress's Prerogative Over Agencies and Agency Decision Makers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627 (1989). To the extent that the separation of powers cases are instead organized according to the particular institution being challenged, they do not possess a legitimate organizing principle. See *supra* note 181.

183. See *Morrison*, 487 U.S. at 686; *Bowsher*, 478 U.S. at 726. See generally Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988); Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989).

184. See *supra* note 101. Viewing the treaty power as part of a constitutive normative process draws upon the jurisprudential theory of Professors McDougal, Lasswell, Reisman, and their associates. See generally McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence* 61, in *INTERNATIONAL LAW ESSAYS* (M. McDougal & W. Reisman eds. 1981).

and break sole-executive agreements if those are limited to topics found in article II. The executive supremacists might welcome that conclusion, although it properly rests upon a topical, not a functional, analysis.

Sole-executive agreements, however, are illegitimate if they concern a topic found in article I and not article II of the Constitution, or if they concern a topic impliedly found in both articles I and II. In such instances, the Constitution requires some legislative governance of the topic. A treaty or at least a congressional-executive agreement must be composed. Some interpretivists might argue that only treaties are appropriate in those situations.<sup>185</sup> But the practice of creating executive agreements is probably too ingrained in our system to stop it completely; and, as with treaties, the establishment of congressional-executive agreements entails the legislative branch's participation, even if the treaty clause is not strictly followed. Therefore, this Author will view congressional-executive agreements as interchangeable with treaties. It is logical to conclude, however, that, if a treaty or congressional-executive agreement, rather than a sole-executive agreement, was necessary in the first place, the President must seek legislative approval before reinterpreting or terminating that accord. Consistency would require that two-thirds of the Senate should approve treaty reinterpretation and termination, while a majority of both Houses should approve the reinterpretation and termination of congressional-executive agreements. That process will ensure that the government remakes and breaks treaties and congressional-executive agreements in the same way that it made those instruments, thus guarding separation of powers concerns. Hence, congressional participation is needed during the entire process of creating, applying, and terminating treaties and congressional-executive agreements, since those accords concern topics found in article II. Although certain congressional supremacists have suggested the same conclusion, they did not rely upon the correct topical analysis.

In sum, this Author proposes an alternative approach to the treaty power. This topical alternative is necessary particularly because Circular 175 has not resolved the executive-agreement debate; the Biden Condition has not resolved the reinterpretation debate; and the sole organ, supremacy clause, and removal arguments have not resolved the termination debate. Instead of asking, "Can the executive unilaterally make, reinterpret, and break international agreements?," the question becomes, "*Which* international agreements can the executive unilaterally make, reinterpret, and break?" Therefore, rather than engage in the usual thrust and parry about whether the treaty process is exclusively an executive or a legislative function, the next subparts, respectively, will apply a topical approach to concrete treaty problems, and will make recommendations about enforcing that approach.

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185. See, e.g., Berger, *supra* note 19; Borchard, *A Reply*, *supra* note 25; Borchard, *Executive Agreement*, *supra* note 25. See generally *supra* notes 25-50 and accompanying text. Treaty authorized executive agreements, however, are not problematical.

### A. *Applying the Topical Analysis*

This subpart topically analyzes several categories of international agreements, assessing whether the President requires congressional approval to make, reinterpret, and terminate those accords. The categories are: disarmament agreements; mutual defense and recognition agreements; humanitarian agreements; and wartime military agreements. The first two categories include treaties that this Article has previously discussed, while the latter two categories include agreements not yet discussed.

#### 1. *Disarmament Agreements*

The first category includes agreements that reduce, limit, or eliminate the parties' arsenals of particular weapons. Although these agreements could be created multinationally, they are normally bilateral accords that the superpowers establish. The ABM and INF treaties exemplify this type of accord, but future disarmament agreements are on the horizon.<sup>186</sup>

A federal statute requires the President to make either treaties or congressional-executive agreements on the topic of disarmament; the statute bars sole-executive agreements on that topic. The Arms Control and Disarmament Act of 1961 ("Disarmament Act"),<sup>187</sup> which established the United States Arms Control and Disarmament Agency as part of the executive branch, provides as follows: "[N]o action shall be taken . . . that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments . . . , except pursuant to the treaty-making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress . . . ."<sup>188</sup> Although no court has ever examined that provision's constitutionality, the Disarmament Act is valid. Article II of the Constitution does not give the President exclusive jurisdiction over arms limitation. The President arguably has some authority over that topic, as the army and navy's commander in chief.<sup>189</sup> Article I, however, empowers the Congress to raise, support, and arm an army and a navy.<sup>190</sup> Since the President, at best, shares the disarmament authority with the Congress, the Disarmament Act constitutionally precludes the executive branch from creating disarmament accords without legislative participation. The Constitution and the Disarmament Act say nothing explicit about the President's ability to reinterpret and terminate disarmament accords. But if the President does not have independent article II authority to make agreements disarming the nation, the executive branch does not logically have any constitutional or statutory right to remake or break those agreements.

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186. See *supra* notes 54-100 and accompanying text regarding ABM and INF treaties. Presidents Bush and Gorbachev discussed new disarmament accords at their June, 1990 summit. See *Bush & Gorbachev Sign Major Accords on Missiles, Chemical Weapons and Trade*, N.Y. Times, June 2, 1990, at 1, col. 6.

187. Arms Control and Disarmament Act, 22 U.S.C. § 2551 (1988).

188. 22 U.S.C. § 2573 (1988).

189. U.S. CONST. art. II, § 2, cl. 1.

190. U.S. CONST. art. I, § 8, cls. 12-16.

Hence, under a topical analysis, legislative approval is necessary before the executive reinterprets or terminates accords that the Disarmament Act mandates be undertaken as treaties or congressional-executive agreements. The Reagan Administration thus acted unconstitutionally in asserting a unilateral executive authority to reinterpret the ABM and INF treaties. Before the executive branch ever develops, tests, or deploys the SDI, and if it ever attempts not to eliminate intermediate-range and shorter-range missiles, the Senate must be consulted. The same conclusion would apply if the President tries unilaterally to reinterpret or terminate future disarmament accords.

## 2. *Mutual Defense and Recognition Agreements*

The second category encompasses both mutual defense agreements and instruments that concern the United States' recognition of foreign governments and countries.<sup>191</sup> The topics of mutual defense and recognition were symbiotically linked in the debate over terminating the Mutual Defense Treaty with Taiwan. Although the legislature should participate in governing the United States' mutual defense, the executive impliedly has exclusive authority to govern recognition.

The fact that President Eisenhower sought the Senate's advice and consent to the Mutual Defense Treaty may be important evidence that the executive lacks unilateral jurisdiction over mutual defense. Indeed, whenever the President creates a treaty (or congressional-executive agreement) on mutual defense or on any international topic, the President apparently concedes that article II of the Constitution does not provide exclusive executive control over that topic and that the legislative branch, under article I, must be consulted. That concession should preclude not only sole-executive agreements on mutual defense, but should preclude the executive from unilaterally reinterpreting or terminating any treaty on mutual defense, including the compact with Taiwan. After all, if the President lacks independent article II authority to make accords on mutual defense, how could the President have the topical authority to remake or break those accords?

As described earlier, the government created the Mutual Defense Treaty with Taiwan pursuant to the Mutual Defense Act.<sup>192</sup> That post-World War II statute required the President to enter a treaty or congressional-executive agreement with any nation or group of nations that was to receive military and financial assistance.<sup>193</sup> The Congress's topical authority to pass that statute derived from its power to raise, support, and arm an army and a navy;<sup>194</sup> to provide for the nation's common defense and general welfare;<sup>195</sup> and even to declare war.<sup>196</sup> As with disarmament agreements, article I of the Constitution provides congres-

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191. See generally L. GALLOWAY, *RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES* (1978).

192. See *supra* note 106 and accompanying text.

193. See *id.*

194. U.S. CONST. art. I, § 8, cls. 12-16.

195. U.S. CONST. art. I, § 8, cl. 1.

196. U.S. CONST. art. I, § 8, cl. 11.

sional authority over mutual defense agreements, even though article II designates the President as the armed forces' commander in chief.<sup>197</sup> Under a topical analysis, therefore, President Carter needed senatorial approval to terminate (or reinterpret) the Mutual Defense Treaty with Taiwan, just as President Eisenhower needed the Senate's approval to make that Treaty. President Carter's unilateral termination of the Treaty was unconstitutional, as the district court correctly held in *Goldwater v. Carter*.<sup>198</sup>

In disagreeing with that holding in *Goldwater*, both the appellate court's opinion and Justice Brennan's dissenting opinion cursorily suggested that terminating the Mutual Defense Treaty was proper under the executive's authority to recognize foreign governments and countries.<sup>199</sup> According to the court of appeals, "the Constitution gave the President full constitutional authority to recognize the PRC and to derecognize [Taiwan]."<sup>200</sup> The court also said that the President "has authority as Chief Executive to determine that there is no meaningful vitality to a mutual defense treaty when there is no recognized state."<sup>201</sup> The recognition power impliedly comes from the President's authority to "receive Ambassadors and other public Ministers"<sup>202</sup> and perhaps from the authority to "appoint Ambassadors [and] other public Ministers and Consuls."<sup>203</sup> Article I does not afford the Congress any recognition power. Since the executive branch possesses exclusive jurisdiction over recognition, the President may unilaterally make, remake, and break sole-executive agreements on that topic. The Supreme Court has upheld sole-executive agreements that recognize new or newly compatible foreign governments or countries.<sup>204</sup> So the appellate court and Justice Brennan correctly suggested that the President has unilateral authority over recognition agreements. The President may also govern topics that are sufficiently related to the recognition power (*e.g.*, sustaining cultural ties between the nations, or compensating for prior commercial claims between the nations' citizens<sup>205</sup>), since the Congress lacks authority over those subsidiary topics.

The appellate court and Justice Brennan, however, were incorrect to conclude that the President's recognition power includes unilateral authority over the topic of mutual defense. As demonstrated above, under article I of the Constitution, the Congress at least shares military authority with the President.<sup>206</sup> The Mutual Defense Act confirmed the sharing of that authority.<sup>207</sup> As Professor Reisman has put it: Mutual defense treaties are "a very special species of agreement . . . . They grew out of a very special complex of legislation after the Second World War. They represent a very innovative [and] experimental

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197. U.S. CONST. art. II, § 2, cl. 1.

198. *Goldwater*, 481 F. Supp. at 949. See *supra* notes 117-22 and accompanying text.

199. *Goldwater*, 617 F.2d at 707-08; 444 U.S. at 1006 (Brennan, J., dissenting).

200. *Goldwater*, 617 F.2d at 707-08.

201. *Id.* at 708.

202. U.S. CONST. art. II, § 3.

203. U.S. CONST. art. II, § 2, cl. 2.

204. See, *e.g.*, *Belmont*, 301 U.S. 324 (1937); see also *supra* note 46 and accompanying text.

205. See *supra* notes 46, 116 and accompanying text.

206. See *supra* notes 189-90 and accompanying text.

207. See *supra* note 192 and accompanying text.

type of agreement between the two branches of the Government . . . ."<sup>208</sup> The executive's recognition power should not be unduly stretched to topics subject to some congressional control under article I, including disarmament.

If terminating the Mutual Defense Treaty was necessary to the United States' recognition of the PRC, President Carter should have consulted with the Senate before terminating that Treaty. It is not anomalous to conclude that President Carter could unilaterally recognize the PRC and withdraw recognition from Taiwan, but needed the Senate's consent to terminate the Mutual Defense Treaty. Under a topical analysis, the executive has exclusive authority over the recognition topic, but at best shares authority with the Congress over the mutual defense topic. The United States, of course, does not have a mutual defense arrangement with every nation that it has recognized. Recognition does not normally involve such an arrangement, and, in those instances, the President does not need senatorial input on recognition. But when recognition involves a mutual defense arrangement, as it did with Taiwan, senatorial input is needed. The real anomaly is to require the Senate's consent to make a mutual defense accord, but not to unmake that accord. In short, the President's authority to create, reinterpret, and terminate recognition agreements does not extend to mutual defense agreements.

### 3. *Humanitarian Agreements*

The third category includes multinational agreements protecting basic human rights during armed conflict and military occupation, such as the four Geneva Conventions of 1949,<sup>209</sup> and during peacetime, such as the Genocide Convention.<sup>210</sup> It also includes terrorism agreements, such as the Hostage Convention<sup>211</sup> and the Internationally Protected Persons Convention,<sup>212</sup> and hijacking agreements.<sup>213</sup> All of these important instruments derive from the post-World War II international condemnation of oppression, brutality, and vio-

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208. *Treaty Termination Hearings*, *supra* note 6, at 388 (statement of Professor Michael Reisman).

209. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

210. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter *Genocide Convention*]. The Genocide Convention applies during wartime as well as peacetime.

211. International Convention Against the Taking of Hostages, Dec. 4, 1979, 18 I.L.M. 1456, *adopted by* G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 39), U.N. Doc. A/C.6/34/L.23 (1979).

212. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167, *adopted by* G.A. Res. 3166, 27 U.N. GAOR Supp. (No. 10), U.N. Doc. A/Res/3166 (1974).

213. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, 974 U.N.T.S. 177 (entered into force Jan. 26, 1973), *reprinted in* 10 I.L.M. 1151 (1971); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (entered into force Oct. 14, 1971), *reprinted in* 10 I.L.M. 133 (1971).

lence.<sup>214</sup> As the new decade and new century unfold, these and other humanitarian agreements will become increasingly significant.

Although the political branches have debated the ratification of the humanitarian agreements, particularly the human rights accords,<sup>215</sup> there has not yet occurred any controversy over the reinterpretation or termination of these agreements. Nevertheless, in the future, perhaps the executive branch might unilaterally try to reinterpret or terminate the humanitarian agreements, just as it did with the disarmament and mutual defense accords. Such Presidential behavior could give rise to any number of hypothetical constitutional questions. For example, could the President constitutionally reinterpret the Genocide Convention, claiming that genocide is a political, and thus an unextraditable, offense, contrary to the Convention's plain and accepted meaning?<sup>216</sup> Could the President terminate the Hostage Convention without the Senate's consent? Or if the Torture Convention,<sup>217</sup> which the Senate is presently considering, is ratified, could the President unilaterally reinterpret that instrument completely to prohibit capital punishment, which would contravene the political branches' current understanding of that instrument?<sup>218</sup> Could the President unilaterally terminate the Torture Convention?

The answer to all of these hypothetical (but not necessarily improbable) questions is no. In aspiring to protect human rights, the humanitarian agreements all define and prohibit certain types of egregious conduct as being international crimes.<sup>219</sup> The agreements permit each party to capture and prosecute these international criminals, even when the prosecuting nation has absolutely no direct jurisdictional connection with the alleged offense.<sup>220</sup> Since these instruments address a topic of criminal law, they are subject to congressional authority, not just Presidential control. Article I of the Constitution specifically empowers the Congress to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."<sup>221</sup> That provision affords congressional authority over pirates, once the most prominent international criminals, and their modern counterparts, human rights offenders and terrorists.<sup>222</sup> Congress has passed federal criminal legislation that implements the humanitarian agreements.<sup>223</sup> Conversely, article II does not give the President any authority over international criminals.

Under a topical analysis, therefore, the government must undertake humanitarian accords in the form of either a treaty or a congressional-executive

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214. See K. RANDALL, *supra* note 3, at 7-9.

215. See generally RESTATEMENT, *supra* note 16, pt. VII, introduction.

216. See *Genocide Convention*, *supra* note 210, art. VII.

217. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, adopted by G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/Res/39/46 (1985), reprinted in 23 I.L.M. 1027 (1984). This reprint of the Torture Convention is the draft form; minor revisions are indicated in 24 I.L.M. 535 (1985).

218. See *id.* at art. 1.

219. See generally K. RANDALL, *supra* note 3, at 179-80, 187-89.

220. The agreements thus incorporate the universality principle of jurisdiction. See *id.* at 179-89.

221. U.S. CONST. art. I, § 8, cl. 10. The older term "law of nations" refers to international norms.

222. See K. RANDALL, *supra* note 3, at 165-69, 179-89.

223. See generally *id.* at 72-76.



agreement, to ensure that the legislative branch governs international human rights and terrorism. In fact, no significant sole-executive agreements exist on the humanitarian topic; treaties almost always govern that topic.<sup>224</sup> In turn, the Senate's consent is also necessary to reinterpret or terminate human rights and terrorism treaties. The Senate's topical authority to reinterpret and terminate humanitarian treaties flows from its power to help make those treaties.

#### 4. *Wartime Military Agreements*

The fourth category includes military agreements that the United States establishes during a declared war. The Constitution gives Congress the power to declare war,<sup>225</sup> and the War Powers Resolution prohibits the President from introducing the armed forces "into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," unless "pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States . . ."<sup>226</sup> Often ineffective, that statute has provoked extensive debate.<sup>227</sup> But rather than address the merits of that debate, the following discussion will assume that the President has properly introduced the armed forces into a particular situation; it will only examine the President's constitutional authority to create, reinterpret, and terminate military compacts while that situation exists. It will consider a few hypothetical questions concerning wartime agreements, similar to the discussion of humanitarian agreements.

Could the President, without congressional authorization, agree with an ally to pursue a particular military strategy? Could the President unilaterally agree to trade prisoners of war with an enemy's leader? Could the President unilaterally establish an armistice agreement? And could the President alone reinterpret or terminate any of those agreements? The answer is yes to each of those questions. Since the President is commander in chief of the armed forces under article II of the Constitution,<sup>228</sup> the executive branch may govern the topics of military strategy, war prisoners, and armistice. Although article I empowers the Congress to declare war and to raise and arm the military,<sup>229</sup> it does not permit Congress to oversee or implement military decisions once the troops have been committed.<sup>230</sup> Every army and navy needs a single leader, and article II exclusively designates the President to command the forces. Given the Presidential power to make sole-executive agreements, whether written or oral, on military matters, the executive is also topically entitled to remake or break those agreements. The Constitution does not require the executive to consult

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224. See generally RESTATEMENT, *supra* note 16, pt. VII, introduction.

225. U.S. CONST. art. I, § 8, cl. 11.

226. 50 U.S.C. § 1541(b) (1982).

227. See generally Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379 (1988); Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968).

228. U.S. CONST. art. II, § 2, cl. 1.

229. U.S. CONST. art. I, § 8, cls. 11-16.

230. See generally L. HENKIN, *supra* note 3, at 50-54, 177.

with the Congress when taking such action. Of course, within the confines of national security, pragmatic and political reasons may occasionally convince a President to communicate major military decisions to at least selected members of Congress.

### B. *Enforcing the Topical Analysis*

Applying a topical analysis, the prior discussion concluded that the President could unilaterally create, reinterpret, and terminate agreements involving recognition and wartime decisions, but not agreements involving disarmament, mutual defense, or humanitarian concerns. This final discussion considers how the federal government could enforce those conclusions. It surveys several possible enforcement mechanisms: constitutional amendment; framework legislation; conditions attached to specific statutes or international agreements; and judicial implementation. The following discussions recommend that the government should not try to amend the Constitution, but should illuminate the treaty clause by passing framework legislation or by adopting statutory or treaty conditions. The federal courts should also help to enforce the topical analysis, but the standing requirement and the political question doctrine may unfortunately impede that alternative. The goal, again, is to extinguish the treaty power debate, with optimum cooperation among the federal actors.

#### 1. *Constitutional Amendment*

Ratifying a constitutional amendment is the most extreme solution to the nation's treaty problems. With virtually every controversy over executive agreements, treaty interpretation, and treaty termination, there have been calls to amend the Constitution in one way or another.<sup>231</sup> The proposed amendments have usually fixated upon the discrete controversy at hand, without viewing the overall treaty making process. Although one might try to compose a constitutional amendment confirming the propriety of the topical approach, the task would be cumbersome; the amendment would have to concern all aspects of the treaty power. Unless the amendment precluded executive agreements, it would have to delineate among the making, interpreting, and terminating of treaties and all three categories of executive agreements. Furthermore, if the treaty amendment were written as broadly as most constitutional provisions are, it would not sufficiently answer the fact-sensitive issues that particular treaties present on an ad hoc basis. Adding to these drafting problems are the immense practical, political, and pecuniary burdens of ratifying any constitutional amendment; witness the problems that surrounded both the equal rights and

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231. See, e.g., *Treaty Termination Hearings*, *supra* note 6, at 327-28 (statement of Leonard Meeker); Sale, *Executive Agreements: A Survey of Legal and Political Controversies Concerning Their Use in U.S. Practice* (1975), reprinted in *Executive Agreement Hearings*, *supra* note 37, at 466, 478-88; Richberg, *The Bricker Amendment and the Treaty Power*, 39 VA. L. REV. 753 (1953); Symposium, *Should the Constitution be Amended to Limit the Treaty Making Power?*, 26 S. CAL. L. REV. 347 (1953) (debating the Bricker Amendment); Trimble, *The Constitutional Common Law of Treaty Interpretation: A Reply to the Formalists*, 137 U. PA. L. REV. 1461, 1473-76 (1989).

flag burning amendments. Wise statespersons have successfully argued against various treaty amendments to the Constitution.<sup>232</sup> Hopefully, the same wisdom will prevail in future debates about amending the treaty clause, even if an amendment could entail a topical analysis.

## 2. Framework Legislation

The Congress could enact "framework legislation," instead of amending the Constitution. Framework legislation, as Professor Casper puts it, differs "from ordinary legislation in that it does not formulate specific policies for the resolution of specific problems, but rather attempts to implement constitutional policies. Both declaratory and regulatory in nature, it describes the constitutional distribution of powers and regulates the decision making of the President and the Congress."<sup>233</sup>

Framework legislation could be a valuable and effective tool in enforcing a topical approach to the treaty power. Unlike a constitutional amendment, framework legislation could be sufficiently complex to provide detailed and specific guidance on the various issues that may surround various international agreements. Working together, the legislative and executive branches should be capable of creating comprehensive framework legislation concerning the entire treaty process, including the creation, interpretation, and termination of treaties and executive agreements. That legislation should be premised upon a topical approach to the treaty power, based on this Article's thesis.<sup>234</sup> In a sense, Circular 175 is a type of framework or declaratory legislation.<sup>235</sup> Circular 175, however, suffers from multiple problems: it concerns only the making of international agreements and not the remaking or breaking of those agreements; it was not formulated with legislative input;<sup>236</sup> and its criteria are wrongly functionalist, rather than topical, in nature. Hence, perhaps through bilateral congressional and executive committees, the political branches should begin to draft topical framework legislation to illuminate the treaty clause. As Professor Casper further describes the general advantages of framework legislation: It "forces both Congress and the President to focus on constitutional considerations, which are ordinarily submerged in disputes concerning specific policies. [It also provides] institutionalized forms for consultation and the resolution of disagreements . . . ."<sup>237</sup>

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232. See *supra* note 231 and accompanying text; see also *ABM Treaty Hearings*, *supra* note 67, at 81-82 (statement of Professor Henkin); *id.* at 83-84 (statement of Professor Tribe); *Treaty Termination Hearings*, *supra* note 6, at 375-77 (statements of former Attorney General Herbert Brownell and former Secretary of State Dean Rusk) (discussing the need for flexibility in resolving specific treaty power disputes); 100 CONG. REC. 2364, 2364-75 (1953) (debate over the Bricker Amendment); Perlman, *On Amending the Treaty Power*, 52 COLUM. L. REV. 825 (1953) (opposing the Bricker Amendment); Sutherland, *Restricting the Treaty Power*, 65 HARV. L. REV. 1305 (1952) (opposing the Bricker Amendment).

233. Casper, *Constitutional Constraints on the Conduct of Foreign Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 482 (1976).

234. See *supra* notes 184-230 and accompanying text.

235. See *supra* notes 37-40 and accompanying text.

236. The fifth of Circular 175's eight criteria does consider the Congress's preference about what type of agreement should be established.

237. Casper, *supra* note 233, at 482.

### 3. *Conditions Attached to Statutes or Agreements*

The legislative branch could alternatively enact more specific statutes or conditions to control the President's governance of particular international agreements. Through statutes, like the Disarmament Act<sup>238</sup> and the Mutual Defense Act,<sup>239</sup> the Congress can compel the President to create treaties or congressional-executive agreements, rather than sole-executive agreements, on specific topics. By those same statutes, the Congress could require that it must be consulted before the executive reinterprets or terminates the corresponding international agreements. The Senate could also adopt a condition in its resolution of consent to a particular treaty, mandating that its consent is necessary to the President's reinterpretation and/or termination of that treaty. Of course, the executive branch disavowed such a condition in the INF Treaty controversy.<sup>240</sup> Nevertheless, the legislative branch should still try to check the executive branch through statutes or treaty conditions, particularly if framework legislation is not forthcoming. The legitimacy of these statutes and treaty conditions depends upon a topical analysis. If the statutes and conditions restrict the President's creation, interpretation, and termination of agreements over topics that are subject to congressional authority, then they are constitutional.<sup>241</sup>

### 4. *Judicial Implementation*

There is finally the option that the federal courts may implement a topical approach to the treaty power. Constitutional litigation may involve the treaty clause whether or not the Congress enacts new framework legislation or adopts new statutory or treaty conditions. Although, as de Tocqueville wrote, "[s]carcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate,"<sup>242</sup> congressional plaintiffs face two significant obstacles in any treaty case: the standing requirement and the political question doctrine. Recall that both obstacles made it difficult for the congressional plaintiffs to get their day in court in *Goldwater*.<sup>243</sup> Commentators have already written extensively about congressional standing<sup>244</sup> and about the political question doctrine in the foreign affairs context,<sup>245</sup> making it unnecessary to add to that literature here.

Suffice it to say that a congressperson has standing to sue if the legislative branch has suffered an institutional injury (for example, to its legislative prerogative) and also if the individual legislator has derivatively suffered a substan-

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238. See *supra* notes 187-90 and accompanying text.

239. See *supra* notes 192-97 and accompanying text.

240. See *supra* notes 96-99 and accompanying text.

241. See generally *supra* notes 184-230 and accompanying text.

242. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 207 (H. Reeve trans. 1961).

243. See *supra* notes 117-20, 129-32 and accompanying text.

244. See, e.g., Henkin, *supra* note 117, at 649-51; McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 252-56 (1981); Note, *The Burger Court's Unified Approach to Standing and its Impact on Congressional Plaintiffs*, 60 NOTRE DAME L. REV. 1187 (1985); Note, *Should Congress Defend its Own Interests Before the Courts?* 33 STAN. L. REV. 715 (1981).

245. See *supra* note 130.

tial injury to his or her ability to work in the Congress.<sup>246</sup> Especially if the Congress passes framework legislation, or if it adopts statutory or treaty conditions requiring its consent to make, reinterpret, or terminate specific international agreements,<sup>247</sup> congresspersons will find it easier to satisfy the standing requisite. Such statutes and conditions evidence that the legislature intends to play a role in treaty governance, as in *Goldwater*.<sup>248</sup> If the President violates such legislation or conditions, the congressional plaintiff might successfully demonstrate both an institutional and a derivative injury.

The political question doctrine might hinder plaintiffs even more than the standing requirement in treaty clause cases. After all, four Supreme Court justices opined that *Goldwater* should be dismissed because it presented a nonjusticiable political question.<sup>249</sup> If the treaty termination issue is nonjusticiable, then treaty interpretation issues are probably also nonjusticiable.<sup>250</sup> On the other hand, *Baker v. Carr*,<sup>251</sup> the Supreme Court's leading decision on the political question doctrine, emphasized that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."<sup>252</sup> And Justice Brennan, who wrote the *Baker* opinion, was one of the justices who vehemently disagreed that *Goldwater* presented a political question.<sup>253</sup> Moreover, several commentators, including the present Author, have generally criticized the political question doctrine for lacking utility and keeping the courts from properly hearing important cases.<sup>254</sup> That criticism would also counsel against applying the political question doctrine specifically in treaty clause cases. Nevertheless, the *Goldwater* plurality opinion is probably a harbinger of judicial inactivity in future cases challenging the President's creation, reinterpretation, and termination of international agreements. Although the federal courts should not languish under the political question doctrine in those cases, the Senate and the President will likely have to cooperate by themselves to enforce the topical analysis, through either framework legislation or statutory or treaty conditions. If such cooperative efforts do not occur, the treaty power controversy may only worsen.

## VI. CONCLUSION

This Article has proposed a topical approach to resolve the significant debates over treaty interpretation and termination. Unlike functional analyses, the topical approach provides a comprehensive appraisal of the treaty power, link-

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246. See *Kennedy v. Sampson*, 511 F.2d 430, 433-36 (D.C. Cir. 1974).

247. See *supra* notes 233-41 and accompanying text.

248. See *supra* notes 119-20 and accompanying text.

249. See *supra* notes 130-32 and accompanying text.

250. In a treaty interpretation case, involving, for example, the ABM or INF treaties, the court would be faced with a dispute between the political branches over both constitutional issues and the correct reading of an arms accord. Recall, however, President Reagan's comment that the Supreme Court might eventually resolve the dispute over the Biden Condition to the INF Treaty. See *supra* note 98 and accompanying text.

251. *Baker*, 369 U.S. 186.

252. *Baker*, 369 U.S. at 211.

253. See *supra* note 135.

254. See *supra* note 130.

ing together not only the reinterpretation and termination problems, but the dispute over executive agreements. The topical approach—involving an assessment of the President's and the Senate's respective foreign affairs powers under the Constitution—is not wedded to the rigid viewpoints of either the executive supremacists or the congressional supremacists. Instead, this Article suggests that the political branches should cooperatively follow the topical approach in the spirit of former Secretary of State Dean Acheson's wise advice: "The central question is not whether Congress should be stronger than the Presidency, or vice versa; but, how the Congress and the Presidency can both be strengthened to do the pressing work that falls to each to do, and to both to do together."<sup>255</sup>

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255. D. ACHESON, *A CITIZEN LOOKS AT CONGRESS* 56 (1957).